Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 2001

STATE OF CONNECTICUT,
Petitioner,

v.

PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the ability of a State to litigate as *parens patriae* in matters of grave importance to the health and welfare of State citizens is an aspect of State sovereignty protected by the United States Constitution such that a clear statement of congressional intent must be found before *parens patriae* standing may be foreclosed.

2. Whether the State of Connecticut, in seeking to proceed as the assignee of ERISA enrollees and requesting relief protecting State citizens from the loss of essential medical care, has alleged an injury sufficient to confer standing pursuant to Article III of the United States Constitution.

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and United States Court of Appeals for the Second Circuit, the plaintiff was the State of Connecticut.

In both courts below, the defendant was Physicians Health Services of Connecticut, Inc.

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In The
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STATE OF CONNECTICUT

Petitioner,

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PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner, the State of Connecticut, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on March 27, 2002, is reported at *State of Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2d Cir. 2002), and is printed in the appendix to this petition at App. A-1.

The opinion of the United States District Court for the District of Connecticut, *Underhill, J.*, is reported at *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F.Supp. 2d 495 (D.Conn. 2000), and is printed in the Appendix to this petition at App. A-29.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on March 27, 2002. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Court of Appeals' ruling dated March 27, 2002. Supreme Court Rule 13.1 ; 28 U.S.C. 2102(c).

STATUTORY PROVISIONS INVOLVED

[REPRINTED IN APPENDIX]

STATEMENT OF THE CASE

On December 14, 1999, the State of Connecticut brought an action against Physicians Health Services of Connecticut, Inc., ("PHS"), an insurance company offering managed care health insurance plans to Connecticut residents. In its class action complaint Connecticut set out

facts, sworn to by the affidavits of plan enrollees, demonstrating that PHS, in its excessive zeal to cut costs, had caused its enrollees to go without medically necessary prescription drugs, and failed to provide them the denial notices and the disclosures required by the Employee Retirement Income Security Act of 1974 ("ERISA"). Enrollee-assignor Anthonio Aresco, for example, was turned away from the pharmacy without the pain medication his doctor had ordered. JA A51. He received no notice informing him how he could appeal PHS' denial of coverage. Mr. Aresco suffered greatly for many days before he was able to obtain the medicine he needed. JA A52.

PHS in practice obstructed access to prescribed medication despite the fact that it had promised, in writing, that enrollees would receive a protective, interim supply of medicine while any questions concerning coverage were worked out.

Connecticut sought to proceed in its capacity as *parens patriae* and as the assignee of individual enrollees. Eight enrollees signed documents entitled "Assignment of Cause of Action Under ERISA," which empowered Connecticut to bring suit for equitable relief pursuant to 29 U.S.C. 1132(a)(3), which permits an enrollee in a health care plan established pursuant to ERISA to bring a civil action ". . . to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or to obtain other appropriate equitable relief. . . ." The relief Connecticut sought would have protected hundreds of thousands of State citizens by ensuring their access to medically necessary prescription drugs.

Connecticut invoked jurisdiction pursuant to 29 U.S.C. 1132(e)(1), which provides that district courts of the United States shall have exclusive jurisdiction of civil

actions brought under ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3).

In its complaint Connecticut asserted that PHS had violated its fiduciary duty under ERISA, which requires a fiduciary to discharge its duties "solely in the interest of participants [employees] and beneficiaries [their dependents]," ERISA § 404(a)(1) 29 U.S.C. 1104(a)(1), 29 U.S.C. 1104(a)(1), by obstructing the enrollees' access to safe, effective, and medically necessary prescription medications. Connecticut also challenged PHS' failure to give enrollees written denial notices when coverage for a prescription medication was denied, or to disclose to enrollees adequate information about plan coverage and procedures as required by ERISA.

Connecticut sought an order enjoining PHS from using a restrictive drug "formulary" in a manner that prevented consumers from receiving the medically necessary prescription drugs ordered for them by their physicians. Connecticut attached to its complaint the affidavits of eight individual enrollees who described the manner in which PHS had obstructed their access to medically necessary prescription medications, resulting in pain and suffering, delayed recovery, and out of pocket expense. Each of the affiants executed an assignment form, assigning to Connecticut his or her right to pursue injunctive relief pursuant to ERISA, 29 U.S.C. 1132(a)(3).

The district court, (Stephan R. Underhill, Judge), dismissed the case on July 12, 2000. The District Court found that "Congress carefully limited the persons authorized to" sue under § 1132(a)(3) to "either 'a participant, beneficiary, or fiduciary' " and that "[t]he State does not meet any of these statutory requirements of standing, and cannot overcome its omission from [§ 1132(a)(3)] either through the doctrine of *parens patriae*

or through the assignment of rights from persons who would have standing." *State of Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F.Supp. 2d 495, 497 (D. Conn. 2000).

The Second Circuit Court of Appeals affirmed the district court's dismissal. The Circuit Court refused Connecticut standing as *parens patriae*, reasoning that Congress, by purposely omitting States from ERISA's list of enumerated parties permitted to bring suit, had manifested its intent that *parens patriae* should not be available: "[b]ecause States are not mentioned in § 1132(a)(3), Congress -- which carefully drafted [the] provisions of § 1132 -- did not intend for them to have the ability to bring suit pursuant to § 1132(a)(3)." *State of Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F. 3d 110, 121 (2d Cir. 2002) (internal quotation marks omitted) ("Connecticut v. PHS").

The Circuit Court also ruled that Connecticut, ". . . in its capacity as an assignee of the right to bring suit for equitable relief, did not suffer an injury of a nature that would confer standing upon it under Article III of the Constitution" *Id.* at 115. The Circuit Court reasoned that, because Connecticut's assignment involved the right to seek equitable relief that would supposedly benefit enrollees only, " . . . the State fails to meet the injury requirement because it does not have a 'concrete private interest in the outcome of the suit.' . . . In other words it has failed to allege that it suffered an 'injury in fact' that is 'particularized.' " *Id.* at 118 (citations omitted). This was true, the Circuit Court argued, because "none of the remedies being sought would flow to the State as assignee." *Id.*

REASONS FOR GRANTING THE WRIT

I. *PARENS PATRIAE*, A HISTORIC POWER RETAINED BY STATES IN OUR FEDERAL SYSTEM, MAY NOT BE PREEMPTED BY CONGRESS WITHOUT A CLEAR AND UNMISTAKABLE EXPRESSION OF INTENT.

The Circuit Court rejected Connecticut's claim of *parens patriae* standing, reasoning that "[b]ecause States are not mentioned in § 1132(a)(3), Congress -- which carefully drafted [the] provisions of § 1132 -- did not intend for them to have the ability to bring suit pursuant to § 1132(a)(3)." *Connecticut v. PHS*, 287 F.3d 110, 121 (2d Cir. 2002)(internal quotation marks omitted). Thus, the Circuit Court *inferred* congressional intent to foreclose *parens patriae* even though ERISA nowhere refers to *parens patriae*, and even though the Second Circuit itself has ruled that the assignees of beneficiaries to ERISA-governed insurance plans, which are also not mentioned in §1132(a)(3), nevertheless have standing to sue under ERISA. *I.V. Services of America, Inc., v. Trustees of the American Consulting Engineers Council Ins. Trust Fund*, 136 F.3d 114, 117 n.2 (2d Cir. 1998).

Where an important and traditional State power such as *parens patriae* is involved, however, the State prerogative may be overridden only by a clear statement of congressional intent.

The Constitution created a federal government of limited powers and preserves the sovereign status of the States. States retain a "substantial portion of the nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *John Alden et al. v. State of Maine*, 527 U.S. 706, 714 (1999). The substantial sovereign authority retained by States in our constitutional system derives in part from the Tenth Amendment to the U.S. Constitution which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Gregory, et al. v. Ashcroft*,

501 U.S. 452, 457 (1991). The powers of the federal and State governments are balanced in a way that reduces the risk of tyranny and abuse. "In the tension between federal and State power lies the promise of liberty." *Id.* at 460. This Court has ruled that congressional action altering this traditional division of power cannot be lightly inferred:

> When "Congress intends to alter [***20] the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (quoting *Atascadero* [*v. Scanlon*, 473 U.S. 234] at 242). This principle applies when Congress "intends to pre-empt the historic powers of the States" or when it legislates in " 'traditionally sensitive areas' " that " 'affect the federal balance.' " *Will, supra* at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)). In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991).

Lance Raygor v. Regents of the University of Minnesota, 534 U.S. 533, ___ , 122 S. Ct. 999, 1006 (2002).

The doctrine of *parens patriae* is the type of traditional State power that cannot be curtailed without a clear statement of congressional intent. *Parens patriae* has its roots in the common-law concept of the "royal prerogative" and is now recognized as "inherent in the supreme power of every State. . . ." *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 600 (1982).

In order to maintain an action as *parens patriae*, a State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest. Id. at 607. Quasi-sovereign State interests generally fall in to two categories:

> First, a State has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. *Id.* at 607.

This second quasi-sovereign State interest includes the right to invoke federal law to protect State citizens. " . . . [A] State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population." Id. at 608.

The right of States to assert their interest as *parens patriae* is fundamental to the States' participation in the federal system:

> . . .A State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing -- except the Constitution or overriding federal law -- that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interests. *Id.* at 612, (concurrence of Justice

Brennan, joined by Justices Marshall, Blackmun, and Stevens).

Connecticut is a "sovereign entity," *id.*, and has asserted its "sovereign interests," *id.*, by invoking the provisions of ERISA to ensure that its citizens receive the prescription medications ordered for them by their attending physicians. Connecticut's decision to assert its status as *parens patriae* in this litigation should not be overridden without a clear statement of Congress' intent to make *parens patriae* unavailable in ERISA cases. States should not lightly be stripped of their historic powers, powers that should in our federal system be accorded deference and respect. This case therefore presents ". . . an important question of federal law that has not been, but should be, settled by this Court. . . ." Supreme Court Rule 10(c). A writ of certiorari should issue to protect States from this dangerous encroachment on their rights under the Constitution.

II. CONNECTICUT HAS AN ARTICLE III INTEREST IN OBTAINING RELIEF PROTECTING THE HEALTH AND WELFARE OF STATE RESIDENTS.

The Court of Appeals ignored prior rulings of this Court, and cast aside Connecticut's historic power to protect its citizens, when it found that Connecticut was without Article III standing as the assignee of ERISA enrollees.

The Court of Appeals held that Connecticut lacked standing because the State ". . . in its capacity as an assignee of the right to bring suit for equitable relief, did not suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Connecticut v. PHS*, 287 F.3d at 115. Because Connecticut's assignment involved the right to seek equitable relief that would supposedly benefit enrollees only, the court reasoned that " . . . the State fails to meet the injury requirement because it does not have a 'concrete private interest in the outcome of the suit.' In other words it has failed to allege

that it suffered an 'injury in fact' that is 'particularized.' " *Id.* at 118 (citations omitted). This was true, the Circuit Court argued, because "none of the remedies being sought would flow to the State as assignee." *Id.*

Apparently responding to the anticipated argument that Connecticut has an interest sufficient for Article III purposes in the health and well-being of its citizens, the Circuit Court, without supporting authority, refused to permit consideration of that interest: " . . . when suing in its capacity as assignee, the State cannot rely on its *parens patriae* interest in the health and well-being of its citizens." *Id.* at 118 n.11.

A. This Court's decision in *Snapp* establishes that States have an Article III interest in seeing that State residents receive the benefits of federal law.

Even if Connecticut does not have *statutory* standing to maintain a *parens patriae* action under ERISA -- if, *arguendo*, Congress has expressed its unmistakable intention that parens patriae should not be available in ERISA cases -- the *Snapp* decision nevertheless establishes that Connecticut has *Article III* standing both as *parens patriae* and as the assignee of enrollees. In fact, Connecticut has two Article III interests: an "interest in the health and well-being -- both physical and economic -- of its residents in general," and an interest in ensuring "that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." *Snapp*, 458 U.S. at 607-08. The Court of Appeals erred when it excluded consideration of these fundamental interests from its analysis of Connecticut's Article III standing as the assignee of enrollees.

B. ERISA assignees have standing to sue and may assert the "injury in fact" suffered by the assignor.

Connecticut also has Article III standing in this case because Congress intended to permit the assignment of

ERISA welfare plan rights, *Mackey v. Lanier Collection Agency and Service, Inc.*, 486 U.S. 825 (1988), and because ". . . the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency of Natural Resources v. United States, ex rel. Jonathan Stevens*, 529 U.S. 765, 773 (2000).

In *Mackey*, this court addressed whether ERISA allowed or prohibited the garnishment of benefits under ERISA-regulated welfare plans. The court noted that while Congress prohibited the alienation of benefits under *pension* plans, 29 U.S.C. § 1056(d)(1), Congress did not intend such a ban on the alienation (including assignment) of benefits under *welfare* plans. *Mackey*, 486 U.S. at 837-38.[1/]

The Second Circuit Court of Appeals has ruled that ERISA assignees have standing: "[w]e agree with our sister circuits that, under federal common law, the assignees of beneficiaries to an ERISA-governed insurance plan have standing to sue under ERISA." *I.V. Services of America, Inc. v. Trustees of the American Consulting Engineers Council Ins. Trust Fund*, 136 F. 3d. 114, 117 n.2 (2d Cir. 1998).[2/]

[1/]As defined in 29 U.S.C. § 1002(3), employee benefit plans are of two types: welfare benefit plans provide health, legal, vacation or training benefits, § 1002(1); pension benefit plans provide retirement income, §1002(2). The plans at issue in this case are welfare benefit plans.

[2/]Eight other courts of appeals have also held that ERISA assignees have standing. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F. 2d 1272, 1277 (6th Cir. 1991); *Kennedy v. Connecticut Gen. Life Ins. Co.*, 924 F. 2d 698, 700 (7th Cir. 1991); *Hermann Hosp. v. MEBA Med. & Benefits Plan*, 845 F. 2d 1286, 1289 (5th Cir. 1988); *Misic v. Building Serv. Employees Health & Welfare Trust*, 789 F.2d 1374, 1379 (9th Cir. 1986); *Lutheran Medical Center v. Contractors, Laborers, Teamsters and Engineers Health*

As we have seen, Connecticut has a historic Article III interest as *parens patriae* that is an important aspect of our federal system. But Connecticut also has an Article III interest in this case because Congress intended that it should. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute" *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). In the present case, Congress has determined that assignees may assert the ERISA rights of ERISA enrollees. The invasion of this congressionally-created interest creates the "injury in fact" required by Article III.

Moreover, the Court has held that an assignee may assert the injury in fact suffered by the assignor. In *Vermont Agency of Natural Resources v. United States, ex rel. Jonathan Stevens*, 529 U.S. 765 (2000), plaintiff Stevens brought a *qui tam* action pursuant to the federal False Claims Act against his former employer, the State of Vermont's Agency of Natural Resources, claiming that the Vermont State agency had submitted false claims to the United States Environmental Protection Agency. On appeal, this court considered whether Stevens had standing under Article III to bring the federal action, since he, himself had not been cheated by the State agency. The court held that Article III was satisfied by Stevens' status as the assignee of the claim at issue: "[w]e believe . . . that adequate basis for [Stevens'] suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. . . . We conclude, therefore, that the United States' injury in

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and Welfare Plan, 25 F.3d 616, 619 (8th Cir. 1994); *City of Hope National Medical Center V. Healthplus, Inc.*, 156 F.3d 223, 229 (1st Cir. 1998); *St. Francis Regional Medical Center v. Blue Cross and Blue Shield of Kansas, Inc.*, 49 F.3d 1460, 1464 (10th Cir. 1995); *Cagle v. Bruner*, 112 F.3d 1510, 1515 (11th Cir. 1997).

fact suffices to confer standing on respondent Stevens." Id. at 773-774 (internal citations omitted).

The Court in *Stevens* particularly noted that Mr. Stevens had suffered no invasion of any legally protected right, and therefore ran afoul of traditional Article III standing requirements:

> There is no doubt, . . . that as to this portion of the recovery -- the bounty he will receive if the suit is successful -- a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit.' But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion -- indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. *Id.* at 772-73 (citations omitted).

Although *Stevens* had not personally been injured in any way, this Court determined that he nevertheless had ". . . standing to assert the injury in fact suffered by the assignor." *Stevens*, 529 U.S. at 773. The Court was confirmed in its conclusion because of "the long tradition of *qui tam* actions in England and in the American colonies." *Id.* at 774.

The Court of Appeals, however, without supporting authority, departed from the *Stevens* analysis by pointedly excluding from its standing determination all consideration of the long tradition of litigation brought by States to protect the health and well-being of their citizens: ". . . when suing in its capacity as assignee, the State cannot rely on its *parens patriae* interest in the health and well-being of its citizens." Connecticut v. PHS, 287 F.3d at 118 n.11.

In fact, there is a rich history in our country of suits brought by States in federal court seeking to protect the health and welfare of State citizens. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

This court has said that "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' " *Vermont v. Stevens*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)). History shows that States have traditionally litigated in federal court to protect their citizens and secure the benefits of the federal system. Like those earlier cases, the present case also involves a case and controversy within the scope of Article III of the Constitution.

CONCLUSION

By denying Connecticut *parens patriae* standing without identifying a clear statement of Congressional intent, and by refusing to acknowledge the reality of Connecticut's Article III "injury in fact," the Court of Appeals has failed to recognize the constitutional dimensions of Connecticut's sovereign interest in the health and welfare of its citizens.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Circuit Court of Appeals Opinion **A-1**

District Court Opinion **A-30**

29 U.S.C. 1132(a)(3) **A-65**

STATE OF CONNECTICUT, Plaintiff-Appellant, - v. - PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC., Defendant-Appellee.

Docket No. 00-7986

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

287 F.3d 110; 2002 U.S. App. LEXIS 5357; 27 E.B.C. 2496

May 1, 2001, Argued
March 27, 2002, Decided

SUBSEQUENT HISTORY: **[**1]** As Amended April 10, 2002.

PRIOR HISTORY: Appeal from an order of the United States District Court for the District of Connecticut (Stefan R. Underhill, Judge) granting the defendant's motion to dismiss the plaintiff's complaint for lack of standing. The State of Connecticut filed 20 this action pursuant to Section 502(a)(3) of the Employment Retirement Income Security Act of 1974 seeking an order enjoining the defendant, Physicians Health Services of Connecticut, Inc., from using a drug "formulary" that allegedly prevents plan participants from receiving drugs prescribed for them by their physicians. We hold that the State lacks standing to assert this claim either under the doctrine of parens patriae or as assignee of certain rights of eight plan participants.

Connecticut v. Physicians Health Servs. of Conn., Inc., 103 F. Supp. 2d 495, 2000 U.S. Dist. LEXIS 12191 (D. Conn. 2000)

DISPOSITION: Affirmed.

COUNSEL: RICHARD BLUMENTHAL, Connecticut Attorney General (Charles C. Hulin, Assistant Connecticut Attorney General, of counsel), Hartford, CT, for Plaintiff-Appellant.

DALY D.E. TEMCHINE, Epstein, Becker, & Green, Washington, D.C. (Stephanie W. Kanwit, Epstein, Becker & Green, Washington, D.C. and Davis S. Poppick, Epstein, Becker & Green, Stamford, CT, of counsel) for Defendant-Appellee.

WILLIAM F. HANRAHAN, Jon W. Breyfogle, Jennifer E. Eller, **[**2]** Groom Law Group, Washington, D.C.; Louis Saccoccio, American Association of Health Plans, Washington, D.C., for Amicus Curiae American Association of Health Plans.

JUDGES: Before: KEARSE and SACK, Circuit Judges, and RAKOFF, District Judge. *.

* The Honorable Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

OPINIONBY: SACK

OPINION:

[*112] SACK, Circuit Judge:

On December 14, 1999, the State of Connecticut brought this suit for equitable relief in the United States District Court for the District of Connecticut against Physicians Health Services of Connecticut, Inc. ("PHS"), an insurance company offering managed care plans to Connecticut residents. The State seeks an order pursuant to Section 502(a)(3) of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a)(3), n1 enjoining the defendant PHS from using a drug "formulary" -- a list of drugs preapproved by PHS for reimbursement -- that allegedly prevents plan enrollees from receiving drugs prescribed for them by their physicians that are medically necessary or preferable to a comparable listed drug. Under § 1132(a)(3), **[**3]** "a participant, beneficiary, or fiduciary" may bring a civil action for equitable relief to redress violations of ERISA or the terms of an ERISA-regulated plan. The State asserts standing to sue in its capacity as parens patriae, and as the assignee of eight individual participants in PHS plans who have purportedly assigned the State their right to seek "appropriate equitable relief" with respect to "any cause of action" they may have as plan participants or beneficiaries. Compl., Exs. 1-8 P 2. The district court (Stefan R. Underhill, Judge) granted the defendant's motion to dismiss the State's complaint for lack of standing. Connecticut v. Physicians Health Servs. of Conn., Inc., 103 F. Supp. 2d 495 (D. Conn. 2000) ("PHS"). The court, in a thorough and careful opinion, held that the State did not meet the requirements for standing under § 1132(a)(3). Id. at 511. The State filed a timely appeal.

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n1 ERISA is codified at 29 U.S.C. §§ 1001 -1461. We refer to the provisions of ERISA as codified: § 502 of ERISA, for example, is referred to as 29 U.S.C. § 1132.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - **[**4]**

We conclude that the State as assignee of the plan participants' rights to bring equitable actions against the defendant lacks standing under Article III of the Constitution. We further hold that the State cannot bring this suit in a parens patriae capacity. Because Congress "carefully drafted" § 1132, parties other than those explicitly named therein -- plan participants, beneficiaries, and fiduciaries -- may not bring suit. Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co., 700 F.2d 889, 893 (2d Cir.), cert. denied, 464 U.S. 845, 78 L. Ed. 2d 138, 104 S. Ct. 148 (1983). The State in its parens patriae capacity is not one of these enumerated parties. We therefore affirm the district court's grant of the defendant's motion to dismiss all the State's claims for lack of standing.

BACKGROUND

In its complaint filed on December 14, 1999, the State alleges that PHS's drug formulary system violates provisions of ERISA that impose on PHS: (1) a fiduciary duty to administer its health care plans solely in the interests of the plan participants; (2) a duty to disclose the full details of its plans to plan participants; **[**5]** and (3) a **[*113]** duty to

provide plan participants with adequate notice of reasons for denials of claims for reimbursement. Compl. PP 83-90. The State asserts that PHS's drug formulary system injures plan participants by denying them "access to safe, effective, and medically necessary" drugs prescribed by their doctors. Id. P 83. The details of the State's allegations are set forth in the district court's opinion. See PHS, 103 F. Supp. 2d at 497-500. Because we do not reach the merits of the claims, we need describe them no further here.

Relying on 29 U.S.C. § 1132 (a)(3), n2 which allows "a participant, beneficiary, or fiduciary" of an ERISA-regulated plan to bring a civil action for injunctive and other equitable relief, the State seeks an order:

> 1. requiring the defendant to provide its enrollees with the prescription medications ordered by the attending physician unless the defendant submits to the Court, and the Court approves, a plan for substituting the defendant's preferred medications for those prescribed while insuring [sic] that (I) the substitution is approved by the attending physician, and (ii) the enrollee experiences **[**6]** no unreasonable delay before receiving an appropriate medication; and
>
> 2. requiring the defendant to comply with the dictates of ERISA and disclose to enrollees information sufficient to inform them fully and

accurately, prior to their enrollment or re-enrollment in the plan, concerning the true nature of the prescription drug benefit to which they are entitled; and

3. requiring that whenever an enrollee requests coverage of a prescription drug by presenting a completed prescription form to a participating pharmacy and coverage is denied, the defendant shall give the enrollee a written denial notice setting forth the specific reason for the denial, and the steps necessary to file an appeal[.]

Compl. P 91. The complaint also requests "such other and further relief as the Court may deem necessary and proper." Id. n3

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n2 ↑Section 1132 provides in pertinent part:

(a) Persons empowered to bring a civil action

A civil action may be brought . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. § 1132 (a)(3). **[**7]**

n3 In addition, the State seeks an order certifying this action as a class action on behalf of all Connecticut residents enrolled in PHS's managed care plans established under ERISA. Because the district court dismissed this action in its entirety, the State's March 30, 2000 motion for class certification was never ruled upon and is not at issue here.

- - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The State advances two theories of standing. First, it asserts standing as the assignee of the rights of eight plan participants as individuals and as representatives of a class consisting of all Connecticut residents enrolled in PHS's managed care plans. Second, it asserts standing in its parens patriae capacity to protect its interest in the health and well-being of its citizens. Each of these plan participants executed a document purporting to assign to the State his or her right to sue for injunctive or other equitable relief pursuant to 29 U.S.C. § 1132 (a)(3). The right to sue for money damages was not assigned and remains with the plan participants. Attached to the complaint are copies of these assignments. **[**8]** Each states:

> I hereby assign to the State of Connecticut any cause of action I may have arising **[*114]** from my status as a participant in or beneficiary of an employee welfare benefit plan established pursuant to the Federal Employee Retirement

Income Security Act of 1974 ("ERISA"), upon the following conditions:

1. I believe my managed care organization has improperly and illegally obstructed my access to safe and effective prescription medications. I believe many other Connecticut residents have been injured in a similar way. I cannot afford to hire private attorneys to protect my rights under ERISA.

2. By this assignment I intend to empower the State of Connecticut, by and through the Attorney General, to take action to protect me, and people like me, pursuant to 29 U.S.C. 1132 (a)(3), which provides that I, or my assignee, may bring an action to enjoin any act or practice which violates the terms of my health care plan, or to obtain other appropriate equitable relief to redress such violations or to enforce provisions of ERISA or the plan. I agree to cooperate with the Attorney General's Office in any such action, and I agree that the facts of my case **[**9]** should be made public. I am willing, if necessary, to testify under oath.

3. Any positive result the Attorney General is able to obtain will help me, and other people in my position,

> to receive the medically necessary prescription medications to which we are entitled and which are essential to our health and well-being.

Compl., Exs. 1-8. In exchange for this assignment, the State neither promised to prosecute the assignors' claims nor provided other consideration.

On January 24, 2000, PHS filed a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that: (1) the State lacked standing to bring this action; (2) the assignor-plan participants had not suffered any injuries compensable under ERISA; and (3) the State failed to state a cause of action under ERISA. On July 13, 2000, the district court granted the defendant's motion to dismiss, holding that the State lacked standing to pursue its claims either as parens patriae or as the assignee of the named participants -- either individually or as representatives of a class. PHS, 103 F. Supp. 2d at 497. The district court concluded **[**10]** that "Congress carefully limited the persons authorized to" sue under § 1132(a)(3) to "either 'a participant, beneficiary, or fiduciary'" and that "the State does not meet any of these statutory requirements of standing, and cannot overcome its omission from section [1132(a)(3)] either through the doctrine of parens patriae or through the assignment of rights from persons who would have standing." PHS, 103 F. Supp. 2d 495 The district court did not address PHS's other asserted grounds for dismissal.

This appeal followed. The sole issue before us is

whether the State has standing in either of the two capacities it asserted in the district court.

DISCUSSION

I. Standard of Review

Because "standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" United States v. Vazquez, 145 F.3d 74, 81 (2d Cir. 1998) (quoting Warth v. Seldin, 422 U.S. 490, 501, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)). This appeal depends solely on questions of law, which we review de novo. See Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) **[**11]** (holding that legal issues presented by a Rule 12(b)(1) motion **[*115]** to dismiss for want of jurisdiction are reviewed de novo).

II. The State's Standing as Assignee

We reach the same conclusion as that of the district court, that the State lacks standing to pursue this action as an assignee of the eight plan participants' right to bring an action in equity, although our reasoning differs from the district court's. The court concluded that the State lacks standing as an assignee because "the civil enforcement provisions of ERISA are exclusive and provide standing only to . . . specifically enumerated" parties, who include plan participants and beneficiaries but not their assignees. PHS, 103 F. Supp. 2d at 510. We do not reach this issue. n4 Rather, we conclude that the State, in its capacity as an assignee of the right to bring suit for equitable relief, did not suffer an

injury of a nature that would confer standing upon it under Article III of the Constitution. This issue is distinct from whether PHS's practices injure the State itself independent of the assignments, a question to which we advert in our discussion of parens patriae standing in Part III **[**12]** of this opinion, below. n5

----------Footnotes----------

n4 We have previously held that assignees have standing to sue under 29 U.S.C. § 1132 (a) in some circumstances. For example, we have held that healthcare providers to whom a beneficiary has assigned his or her claim in exchange for healthcare have standing to sue under ERISA to recover for medical expenses incurred. I.V. Servs. of Am., Inc. v. Trs. of Am. Consulting Eng'rs Council Ins. Trust Fund, 136 F.3d 114, 117 n.2 (2d Cir. 1998). After oral argument in this case, we decided in Simon v. General Electric Co., 263 F.3d 176 (2d Cir. 2001) (per curiam), that a creditor of a health care provider does not have standing under 29 U.S.C. § 1132 (a)(1)(B). Id. at 177-78. In that decision, we stated that ERISA confers standing on assignees only if they are "healthcare providers to whom a beneficiary has assigned his claim in exchange for health care benefits." Id. at 178. Simon does not necessarily control this case, however, because the general rule it announced is dicta directed at § 1132(a)(1)(B). We have never decided whether a state may obtain standing as an assignee of a plan participant under § 1132 generally or whether different rules of standing apply under § 1132(a)(3) than under § 1132(a)(1)(B). See Strom v. Goldman, Sachs & Co., 202 F.3d 138, 148 (2d Cir. 1999) ("Section

[1132(a)(3)] 'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations [of ERISA] that [§ 1132] does not elsewhere adequately remedy.'") (quoting Varity Corp. v. Howe, 516 U.S. 489, 512, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996)) (first two brackets in original). Because we conclude that the State in this case lacks Article III standing, we do not reach the question of whether, as a matter of statutory construction, a State could ever obtain standing as an assignee under § 1132(a)(3). **[**13]**

n5 We need not and therefore do not address the other issues raised by the defendant or amicus curiae, including: (1) whether ERISA bars assignments to state governments; (2) whether breach of fiduciary duty claims are personal and cannot be assigned; (3) whether a party can assign a cause of action without also assigning the underlying rights and benefits; and (4) whether the non-assignment clauses in the PHS plans bar these assignments.

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The assignments purport to transfer to the State any right of action for equitable relief possessed by the plan participants by virtue of their status as plan participants or beneficiaries. They do not, the State acknowledges, confer "actual" rights or benefits under ERISA on the State. Pl.'s Br. at 15-17. The right to recover benefits or to seek money damages remains with the assignors. n6 Moreover, the **[*116]** assignments divorce the equitable cause of action aimed at an alleged breach of fiduciary duty from the duty itself because they do not create a fiduciary duty running from PHS to the State. And

the assignments do not shift the loss suffered by individual **[**14]** enrollees from the alleged breach of such duty from the individuals to the State.

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n6 The assignments each begin by assigning to the State "any cause of action" arising under ERISA. See Compl., Exs. 1-8. The assignment is then qualified as being "upon the following conditions." Id. The second paragraph reads, in pertinent part, "By this assignment I intend to empower the State of Connecticut, by and through the Attorney General, to take action to protect me, and people like me, pursuant to 29 U.S.C. 1132 (a)(3), which provides that I, or my assignee, may bring an action to enjoin any act or practice which violates the terms of my health care plan, or to obtain other appropriate equitable relief to redress such violations or to enforce provisions of ERISA or the plan." Id. P 2. The State agrees that the intent of the parties was for the plan participants to assign only their right to such equitable relief and thus retain the right to seek payment of their benefits. See Pl.'s Br. at 15 ("Most important, the assignments exclude any claims for benefits. Instead, the assignments are limited to 'any cause of action for equitable relief . . . . '") (emphasis in original; purporting to quote assignments); cf. Audiotape of Oral Argument, May 1, 2001 (To panel member's question, "But they are retaining the right to sue for those benefits. They are only giving you the right to pursue injunctive relief, right?" the State's Attorney General responded, "They assigned the right to pursue injunctive relief. That is the only relief they sought." Answering a

related question, he said, "The State of Connecticut has nothing but the right to sue and seek the relief that would protect these individuals from the abuses that we claim violate federal law.")

- - - - - - -End Footnotes- - - - - - - - - - - - - -

[15]**

"[↑]Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." Sierra Club v. Morton, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972).

> [↑]Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies." From this has emerged the doctrine of constitutional standing. Federal courts must determine [standing] at the threshold of every case . . . . "It would violate principles of separation of powers for us to hear a matter that was not a case or controversy and therefore not delegated to the [federal] judiciary under Article III."

Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 381-82 (2d Cir. 2000) (quoting United States v. Cambio Exacto, S. A., 166 F.3d 522, 527 (2d Cir. 1999); other citations omitted; second brackets in original).

At an "irreducible constitutional minimum," Article III standing requires that the plaintiff "have suffered an injury in fact -- an invasion of a legally protected **[**16]** interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (internal citations and quotation marks omitted); accord Vt. Agency of Natural Res. v. United States ex. rel. Stevens, 529 U.S. 765, 771 (2000); St. Pierre v. Dyer, 208 F.3d 394, 401 (2d Cir. 2000); Vazquez, 145 F.3d at 80; cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) ("At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.") (citation and internal quotation marks omitted). n7 The Supreme Court has **[*117]** noted, as a "prudential principle[] [,] . . . that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Valley Forge Christian Coll., 454 U.S. at 474 **[**17]** (citation and internal quotation marks omitted).

----------Footnotes----------

n7 Article III standing also requires that there be "a causal connection between the injury and the conduct complained of" and that it is "likely . . . that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61; accord Vt.

Agency, 529 U.S. at 771 (2000) (internal quotation marks omitted); Dyer, 208 F.3d at 401; Vazquez, 145 F.3d at 80. We do not address these additional requirements here because the State fails to meet the "injury in fact" requirement.

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The State does not bring suit here as a party injured itself, but as an assignee of others who assert injury. The Supreme Court has held that ✦in at least some cases, an "assignee of a claim [does have] standing to assert the injury in fact suffered by the assignor." Vt. Agency, 529 U.S. at 773. Typically, the assignee, obtaining the assignment in exchange for some consideration running from it to **[**18]** the assignor, replaces the assignor with respect to the claim or the portion of the claim assigned, and thus stands in the assignor's stead with respect to both injury and remedy. For example, we have held that a healthcare provider that spends money on behalf of a patient for drugs and in return receives an assignment of the patient's rights to reimbursement under the healthcare plan has standing as assignee in a lawsuit under ERISA against the plan that refused the reimbursement. See I.V. Servs. of Am., Inc. v. Trs. of Am. Consulting Eng'rs Council Ins. Trust Fund, 136 F.3d 114, 117 n.2 (2d Cir. 1998). In I.V. Services, the injury -- the unreimbursed cost of drugs prescribed for the assignor -- was assumed by the assignee, and in return the right to seek redress for it passed from the patient to the provider under the assignment. We noted our agreement "with our sister circuits that, ✦under federal common law, the assignees of beneficiaries to an ERISA-governed insurance plan have

standing to sue under ERISA." Id. (citations omitted). By sustaining the plaintiff's standing as a matter of federal common law, we implicitly held that healthcare providers **[**19]** under these circumstances have constitutional standing.

There are also situations where, even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a claim (or a portion thereof) -- not only the right or ability to bring suit -- may confer standing on the assignee. n8 In Vermont Agency, the Supreme Court held that the plaintiff had standing under Article III to bring a qui tam n9 civil action pursuant to the False Claims Act, which allows a private person (the relator) to bring suit on behalf of the United States government and in return recover a share of the proceeds from the action. 529 U.S. at 769, 771-78. The Court concluded that "the United States' injury in fact suffices to confer standing on [the relator]." Id. at 774. The Court explained that an "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The [False Claims Act] can reasonably be regarded as **[*118]** effecting a partial assignment of the Government's damages claim." Id. at 773 **[**20]** (footnote omitted). n10

----------Footnotes----------

n8 Although the Supreme Court held that an "assignee of a claim has standing," Vt. Agency, 529 U.S. at 773, it did not define further "claim." We note, however, that "claim" cannot simply refer to a right to bring suit. In Lujan, the Supreme Court

struck down the "citizen-suit" provision of the Endangered Species Act of 1973. 504 U.S. at 571-78. In doing so, the Court expressly held that ↑ Congress cannot grant standing to a party if the party has no concrete interest in the suit and only has a "public interest in proper administration of the laws." Id. at 576.

n9 The Court explained: "Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency, 529 U.S. at 768 n.1.

n10 The Vermont Agency Court's analysis also depended heavily on the "long tradition of qui tam actions in England and the American Colonies," id. at 774, which it described in some detail. The Court noted that "↑Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" Id. at 774 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)).

---------End Footnotes----- ---- **[**21]**

The case before us differs critically from Vermont Agency and I.V. Services. The qui tam relator in the former and the healthcare provider in the latter each had a "'concrete private interest in the outcome of [its] suit.'" See Vt. Agency, 529 U.S. at 772 (quoting Lujan, 504 U.S. at 573). That is, the outcome had the potential to affect the qui tam relator and healthcare provider in a "personal and

individual way": They both stood, personally and individually, to recover a monetary award. See Lujan, 504 U.S. at 560 & n.1 (noting that an "injury in fact" must be "particularized" and defining "particularized" as affecting "the plaintiff in a personal and individual way") (citations and internal quotation marks omitted). Furthermore, their interest in the suit was directly related to the assignors' original injuries. See Vt. Agency, 529 U.S. at 772 ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing.") (citations omitted). The money damages they sought to recover would be awarded in recompense for the property interest allegedly injured by the defendants.

As assignee **[**22]** in the present case, however, the State fails to meet the injury requirement because it does not have a "concrete private interest in the outcome of the suit." See id. (citation and internal quotation marks omitted). In other words, it has failed to allege that it suffered an "injury in fact" that is "particularized." See Lujan, 504 U.S. at 560 (citation, internal quotation marks, and footnote omitted). The actions of the defendant, as alleged, do not "affect the plaintiff in a personal and individual way." n11 Id. at 560 n.1 (thus defining "particularized"). Through the assignments, the State has acquired only the right to control the equitable portion of a lawsuit seeking redress of the assignor-participants' rights under ERISA. None of the remedies being sought would flow to the State as assignee. n12 As the State puts it, "this case is brought solely for the benefit of the assignors and those similarly situated." Pl.'s Br. at 11 (emphasis added). Even if the assignments are valid as a contractual matter, they thus merely give

the State the right to act as a nominal party. Cf. New [*119] York ex rel Abrams v. Cornwell Co., 695 F.2d 34, 38 (2d Cir. 1982) [**23] (holding that a quasi-sovereign interest that will support parens patriae standing must be distinguished "from [inter alia] . . . private parties' interests where the State serves merely as a nominal party"), vacated in part on other grounds, 718 F.2d 22 (2d Cir. 1983) (in banc). The State as an assignee therefore lacks standing under Article III of the Constitution.

- - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n11 The State as an assignee has no interests other than those assigned to it by the assignors. Put another way, the State, as assignee, has the same interests as any private citizen to which such rights had been assigned. Thus, when suing in its capacity as assignee, the State cannot rely on its parens patriae interest in the health and well-being of its citizens.

n12 In its complaint, the State repeatedly states that the enrollees were injured and that the enrollees would benefit from the lawsuit. See Compl. P 3 (stating that the enrollees have suffered "real and immediate injury" that includes "unnecessary pain and suffering, delayed recovery, and out-of-pocket expenditure"); id. P 5 (stating that the enrollees were injured); id. P 91 (requesting that PHS "provide its enrollees with the prescription medications," "disclose to enrollees" sufficient information, and "give the enrollee a written denial notice") (emphases added).

- - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

[**24]

"We have no doubt about the sincerity of [the State's] stated objectives and the depth of [its] commitment to them. But ✦the essence of standing is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct." Valley Forge Christian Coll., 454 U.S. at 486 n.21 (citations and internal quotation marks omitted; ellipses in original). We hold that the State as purported assignee of the right to seek equitable relief for the assignors' alleged injury lacks Article III standing because it does not, through that assignment, possess the requisite interest that is or is threatened to be injured by PHS's conduct. n13

----------Footnotes----------

n13 We do not base our holding on the State's status as a state. Cf. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 344, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977) (holding that "the Commission's status as a state agency, rather than a traditional voluntary membership association," does not "preclude[] it from asserting the claims of the Washington apple growers and dealers who form its constituency"). A private individual who received these assignments would also lack Article III standing. While there may be differences between the abilities of private parties and of states to assert standing under the statutory provisions of ERISA, such differences are irrelevant to the Article III inquiry.

Nor do we base our holding on the fact that the State is seeking equitable relief, not money damages. In some circumstances, an assignee seeking solely injunctive relief has standing. We have no reason to doubt, for example, that a person assigned a claim with respect to tangible property would have standing to seek an injunction with respect to the care or custody of that property.

---- - - - - - -End Footnotes- - - - - - - - - - - [**25]

III. The State's Standing as Parens Patriae

A. Article III Standing

As an alternative basis for jurisdiction, the State asserts the right to institute this action in its capacity as parens patriae. The doctrine of parens patriae allows states to bring suit on behalf of their citizens in certain circumstances by asserting a "quasi-sovereign interest." Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982). The doctrine of parens patriae derives from the common-law principle that a sovereign, as "parent of the country," may step in on behalf of its citizens to prevent "injury to those who cannot protect themselves." Id. at 600 (citation and internal quotation marks omitted).

The district court, in concluding that the State had no Article III standing to bring this litigation, reviewed various factors that the Supreme Court, this Court, and others have viewed as prerequisites for parens patriae standing. PHS, 103 F. Supp. 2d at 504-09. The court concluded that the State had

"articulated an interest apart from the interests of the particular private **[**26]** parties referenced in the complaint," id. at 506 (citation omitted), and that it had met the requirement that the injury asserted be to "a sufficiently substantial segment of its population," id. at 504. The court held, however, that ERISA's broad preemption clause removed from the State its "quasi-sovereign interest in the specific relief sought by this lawsuit," id. at 507, and, in "a very close call," id., that there were "adequate alternative **[*120]** means of civil enforcement by which individual plaintiffs may obtain complete relief," id. at 509. Based on its last two holdings, the district court concluded that the State lacked parens patriae standing under Article III.

We might be inclined to disagree with the district court were it necessary to address the issue of Article III parens patriae standing. n14 We do not think, however, that it is.

----------Footnotes----------

n14 First, it is not clear to us that the State seeks to impose state law on a field preempted by ERISA, rather than to enforce ERISA itself. The Supreme Court stated in Alfred L. Snapp & Son, Inc. that a characteristic of a valid parens patriae suit is that the asserted injury "is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." 458 U.S. at 607 (footnote omitted). Such is the injury asserted by the State here. The State might well choose to enact legislation to govern this area but cannot because of the broad preemptive scope of ERISA. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41,

45, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987) (noting that ERISA preempts all state law regulating employee benefit plans).

Second, the State raises concerns that may be legitimate regarding the likelihood that individual enrollees could or would pursue litigation on the scale necessary to obtain the full relief to which the State thinks its citizens are entitled. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 739, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981) (finding parens patriae standing appropriate, in part, because "individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small"); Puerto Rico ex rel. Quiros v. Bramkamp, 654 F.2d 212, 217 (2d Cir. 1981) (finding that individuals could not obtain complete relief because "there is no assurance that the individual workers could bear the cost of the lawsuit" and "the interests of the individual laborers . . . are not necessarily coextensive with those of the public"), cert. denied, 458 U.S. 1121, 73 L. Ed. 2d 1383, 102 S. Ct. 3509 (1982); 1 Laurence H. Tribe, American Constitutional Law § 3-20, at 454 (3d ed. 2000) (stating that states may bring parens patriae suits "to challenge allegedly illegal business activities on behalf of citizen consumers as a statewide 'class' of sorts -- a group whose members may lack a sufficient economic stake to justify bringing suit as individuals or who may have insufficient incentive, or may otherwise be unable to meet the criteria, to sue as a Rule 23 class") (citing Maryland v. Louisiana, 451 U.S. at 737-39).

----------End Footnotes----------

[**27]

B. Statutory Standing

Whether or not the State has parens patriae standing under Article III, we conclude that it lacks statutory standing under ERISA's § 1132(a)(3). ✦ When determining whether a state has parens patriae standing under a federal statute, we ask if Congress intended to allow for such standing. See Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 260-66, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972) (parsing statutory language and examining legislative history before deciding that states cannot bring parens patriae actions for damages under § 4 of the Clayton Act because Congress did not intend to allow such suits); Illinois v. Life of Mid-Am. Ins. Co., 805 F.2d 763, 766 (7th Cir. 1986) (concluding that parens patriae standing was absent because "even if the complaint did sufficiently allege an injury to the state in its quasi-sovereign capacity, it [was] not clear to [the court] that Congress, in enacting the RICO statute, intended to permit such a parens patriae proceeding"); see also New York ex rel Vacco v. Reebok Int'l Ltd., 96 F.3d 44, 46 (2d Cir. 1996) (noting that the [**28] Hart-Scott-Rodino Antitrust Improvement Act of 1976 explicitly provides for parens patriae standing).

✦Section 1132(a)(3) allows "a participant, beneficiary, or fiduciary" of an ERISA-regulated plan to bring a civil action for injunctive and equitable relief. Other subparts of § 1132 allow the Secretary of Labor to bring specified actions. Id. §§

1132(a)(2), (4), (5), (8), (9). Section **[*121]** 1132(a)(7) authorizes states "to enforce compliance with a qualified medical child support order," and § 1169(b) of the same title authorizes states to acquire the rights of third parties through assignment for the limited purpose of recouping payments made under state plans for medical assistance. Nowhere else in § 1132 are states authorized to bring suit.

Courts have consistently read § 1132(a)(3) as strictly limiting "the universe of plaintiffs who may bring certain civil actions." Harris Trust and Savs. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 247, 147 L. Ed. 2d 187, 120 S. Ct. 2180 (2000) (emphasis deleted). Absent a valid assignment of a claim, at least, non-enumerated parties lack statutory standing to bring suit under § 1132(a)(3) even if they have a direct stake in **[**29]** the outcome of the litigation. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983) ("ERISA carefully enumerates the parties entitled to seek relief under [§ 1132]; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action . . . ."); Pressroom Unions, 700 F.2d at 892 (concluding that § 1132(e)(1), which states that pension plan participants, beneficiaries, and fiduciaries may sue for certain violations of ERISA, "should be viewed as an exclusive jurisdictional grant" of standing to the parties specified); see also Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, , 122 S. Ct. 708, 712, 151 L. Ed. 2d 635 (2002) ("ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to

authorize other remedies that it simply forgot to incorporate expressly.") (emphasis, citations, and internal quotation marks omitted).

Because states are not mentioned in § 1132(a)(3), Congress -- which "carefully drafted [the] provisions" of § 1132 -- did not **[**30]** intend for them to have the ability to bring suit pursuant to § 1132(a)(3). See Pressroom Unions, 700 F.2d at 893. Furthermore, as the district court explained, "the inference that Congress intentionally omitted states from section [1132(a)(3)] finds strong support in the fact that states are expressly empowered by section [1132(a)(7)] to bring only a very limited class of cases" to enforce qualified medical child-support orders. PHS, 103 F. Supp. 2d at 502; see also 29 U.S.C. § 1169 (b) (allowing states to use assignments in certain circumstances not present in this case).

By holding that the State lacks parens patriae standing because § 1132(a)(3) does not expressly provide for such standing, we do not of course intend to imply that states may only sue in their parens patriae capacity when a statute specifically provides for suits by states. There is considerable authority for the proposition that "states have frequently been allowed to sue in parens patriae to . . . enforce federal statutes that . . . do not specifically provide standing for state attorney generals." New York ex rel Vacco v. Mid Hudson Med. Group, P.C., 877 F. Supp. 143, 146 (S. D.N.Y. 1995) **[**31]** (collecting cases). But cf. Standard Oil Co., 405 U.S. at 264 (rejecting parens patriae standing in a suit for damages in the absence of a "clear expression of congressional purpose" allowing such standing because of the

concern of double recovery). As the district court correctly pointed out, however, "the federal statutes under which states have been granted parens patriae standing all contain broad civil enforcement provisions" that "permit suit by any 'person' that is 'injured' or aggrieved.'" PHS, 103 F. Supp. 2d at 509-10 (collecting federal statutes with broad enforcement provisions). Section 1132 of ERISA, by contrast, carefully limits the parties who may seek relief.

[*122] By our holding, we reject the State's argument that Congress cannot limit states' power to sue as parens patriae. Specifically, the State argues that "the ability of states to act in the interest of their citizens in a parens patriae capacity is an essential attribute of the inherent sovereignty of states that may not be diminished in light of the principles of our federalism that are reflected in the Constitution and the Tenth Amendment." Pl.'s Ltr. Br. **[**32]** of June 12, 2001, at 14.

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Federal statutes validly enacted under one of Congress's enumerated powers -- here, the Commerce Clause -- cannot violate the Tenth Amendment unless they commandeer the states' executive officials, see Printz v. United States, 521 U.S. 898, 933, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), or legislative processes, see New York v. United States, 505 U.S. 144, 161-66, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992); see also Cellular Phone Taskforce v. Fed. Communications Comm'n, 205 F.3d 82, 96 (2d Cir. 2000) (holding

that a federal telecommunications law preempting states' ability to regulate the health and safety issues with respect to certain personal wireless service facilities does not violate the Tenth Amendment because the "statute does not commandeer local authorities to administer a federal program"), cert. denied, 531 U.S. 1070, 148 L. Ed. 2d 661, 121 S. Ct. 758 (2001); City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) **[**33]** (holding that the Tenth Amendment is a "shield against the federal government's using state and local governments to enact and administer federal programs" not a "sword allowing states and localities to engage in passive resistence that frustrates federal programs"), cert. denied, 528 U.S. 1115 (2000); United States v. Sage, 92 F.3d 101, 107 (2d Cir. 1996) (concluding that the Child Support Recovery Act does not violate the Tenth Amendment because it does not "compel[] a State to enact and enforce a federal family program"), cert. denied, 519 U.S. 1099, 136 L. Ed. 2d 727, 117 S. Ct. 784 (1997); United States v. Bostic, 168 F.3d 718, 724 (4th Cir.) (holding that a federal gun statute does not violate the Tenth Amendment because it was validly passed under the Commerce Clause and imposes no "affirmative obligation" on the states), cert. denied, 527 U.S. 1029, 144 L. Ed. 2d 785, 119 S. Ct. 2383 (1999). Section 1132 does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them. It therefore does not violate the Tenth Amendment.

CONCLUSION [34]**

For the foregoing reasons, the judgment of the district court is affirmed.

STATE OF CONNECTICUT v. PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.

Civ. Action No. 3:99CV2402 (SRU)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

103 F. Supp. 2d 495; 2000 U.S. Dist. LEXIS 12191; 24 E.B.C. 2589

July 12, 2000, Decided
July 13, 2000, Filed

DISPOSITION: [**1] PHS' Motion to Dismiss (doc. # 10) GRANTED.

CORE TERMS: enrollee, parens patriae, beneficiary, medication, prescription, residents, assignee, redress, equitable relief, quasi-sovereign, fiduciary, empowered, effective, safe, enforcement action, prescribed, formulary, complete relief, motion to dismiss, statutory scheme, civil action, regulation, segment, enjoin, attending physician, bring suit, coverage, notice, injunctive relief, specifically enumerated

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JUDGES: Stefan R. Underhill, United States District Judge.

OPINIONBY: Stefan R. Underhill

OPINION: [*497]

RULING ON DEFENDANT'S MOTION TO DISMISS

This proposed class action raises allegations that the prescription drug benefit offered by the defendant, Physicians Health Services of Connecticut, Inc. ("PHS"), uses a drug formulary that obstructs enrollees' access to prescription medications that their physicians believe are most safe and effective. The plaintiff, State of Connecticut ("Connecticut" or "the State"), has brought suit in its capacity [**2] as parens patriae and as the assignee of certain individual PHS enrollees. The State asserts claims for equitable relief pursuant to Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 1132*(a)(3), which permits a "participant, beneficiary, or fiduciary" in a health care plan established pursuant to ERISA to bring an action "to enjoin any act or practice which violates any provision . . . of the plan, or . . . to obtain appropriate equitable relief." Currently pending is the defendant's January 24, 2000 Motion to Dismiss, brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The fundamental issue raised by the motion to dismiss is whether the State of Connecticut has standing, either under the doctrine of parens patriae or as the assignee of rights of various named participants, to bring an ERISA civil enforcement action under section 502(a)(3). Congress carefully limited the persons authorized to bring an ERISA civil enforcement action, and any such plaintiff must be either "a participant, beneficiary, or fiduciary." The State does not meet any of these statutory requirements of standing, [**3] and cannot overcome its omission from section 502(a)(3) either through the doctrine of parens patriae or through assignment of rights from persons who would have standing. Accordingly, the defendant's motion to dismiss (doc. # 10) is granted.

I. Background

In its complaint, the State alleges that PHS uses a drug formulary that obstructs enrollees' access to prescription medications that their physicians believe are most safe and effective. The State's principal allegations regarding PHS' drug formulary system can be paraphrased as follows:

(1) PHS uses a prior approval process that pressures physicians and patients into using medications that PHS prefers. If a medication is not preferred, PHS will deny coverage unless the physician submits and PHS approves a prior approval request. Prior approval may be granted if PHS determines that the non-preferred drug is medically necessary for the particular patient.

(2) PHS' determination whether a drug is "preferred," is based largely on cost factors rather than effectiveness.

(3) Physicians and enrollees are pressured to accept a preferred drug even when it is not the drug originally prescribed by [**4] the physician and even when the

preferred drug is less safe and less effective than the drug originally prescribed.

(4) PHS uses a variety of techniques to persuade physicians and enrollees to "switch" from a prescribed drug to a preferred drug, including the denial of coverage for non-preferred drugs and the imposition of onerous prior-approval paperwork.

See Compl. at 2-3, P 3.

The State alleges that, although ERISA requires PHS to fully inform enrollees about the nature of their health plan benefits, PHS has failed to disclose the nature of the formulary system. Connecticut also alleges that, although ERISA requires that an enrollee receive written notice when coverage for a plan benefit is denied, including instructions on how to appeal, PHS fails to give enrollees any notice at all. Accordingly, the State claims that PHS has violated its fiduciary duty under [*498] ERISA to administer its health plan solely in the interest of its enrollees and has injured enrollees by maintaining a drug formulary in a manner that serves its own financial interest.

The complaint sets forth three claims. The first claim alleges that PHS has breached its fiduciary duty under ERISA. The [**5] State alleges that PHS is a "fiduciary" as that term is defined in ERISA section 3(21)(A), *29 U.S.C. § 1003*(21)(A), and that ERISA section 404(a)(1), *29 U.S.C. § 1104*(a)(1), requires a fiduciary to discharge its duties "solely in the interest of participants [employees] and beneficiaries [their dependents]." See Compl. at 27, P 83. The State claims that PHS has breached its fiduciary duty to enrollees by obstructing enrollees' access to safe, effective and medically necessary prescription medications. Id.

The second claim alleges that PHS breached certain ERISA disclosure obligations. Specifically, the State alleges that:

ERISA requires that each plan participant and beneficiary shall be given a summary plan description written in a manner calculated to be understood by the average plan participant, sufficiently accurate and comprehensive to reasonably apprise participants of their rights and obligations under the plan and containing, among other things, information regarding the plan's requirements respecting eligibility for participation and benefits and the circumstances which may result in disqualification, ineligibility [**6] or denial or loss of benefits. ERISA § 102, *29 U.S.C. § 1022.* In addition, ERISA § 104(b), *29 U.S.C. § 1024*(b), requires that a summary description of any reductions in covered services must be provided to participants and beneficiaries within 60 days after the changes are adopted.

Compl. at 27, P 85. The State alleges that PHS fails to disclose to enrollees the information required by these provisions. The State claims, for example, that PHS fails to disclose that:

(a) PHS lists prescription drugs as preferred not because of their effectiveness but because of their low cost. The preferred drugs are inexpensive because the defendant has received discounts and rebates from pharmaceutical companies in exchange for including their drugs on the preferred list.

(b) PHS will deny coverage for a prescribed medication even though the preferred substitute may be less safe or less effective.

(c) PHS makes no individualized determination whether the medication prescribed by the attending physician is medically necessary for that particular patient unless the attending physician somehow learns of the denial and initiates [**7] a time consuming "prior approval process."

(d) When it denies coverage for a non-preferred medication PHS does not inform the attending physician.

(e) When it denies coverage for a non-preferred medication PHS does not give the enrollee a written denial notice or explanation of appeal rights.

Compl. at 28, P 86.

The third claim alleges that PHS breached certain ERISA notice obligations. Specifically, the State alleges that "Section 503(1) of ERISA, *29 U.S.C. § 1133*(l), provides that every employee benefit plan must 'provide adequate notice in writing to any participant or beneficiary whose claim for benefits has been denied, setting forth specific reasons for such denial . . . .'"

Compl. at 29, P 89. The State further alleges that the written denial must include:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an [*499] explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to [**8] be taken if the participant or beneficiary wishes to submit his or her claim for review.

Compl. at 29, P 89, citing *29 C.F.R. 2560.503-1(b)*. The State alleges that PHS fails to provide enrollees with the detailed notices that the State claims are required by law.

In support of these claims, the complaint identifies eight individual PHS members that the State alleges are representative enrollees who have had access to safe and effective prescription medicines obstructed by the PHS drug formulary. Attached to the complaint are the affidavits of all of the representative enrollees, setting forth allegations of the significant difficulty they experienced in obtaining coverage for certain necessary medication that their physicians prescribed and allegations of the considerable suffering they endured as a result. The State claims that these representative enrollees have experienced serious pain and suffering, delays in recovery of benefits and unnecessary out-of-pocket expense because PHS: obstructed their access to prescription medications their physicians prescribed; failed to disclose to them the full nature of the PHS formulary system; and failed to give them proper notice [**9] of the denial of coverage and instructions on how to appeal. n1

n1 PHS claims that, contrary to the State's allegations that PHS harmed these eight individuals by obstructing access to safe and effective prescription medications, the affidavits of the individual attached to the complaint reveal a different story. Specifically, PHS argues that seven of the eight individuals ultimately received the precise medication prescribed by their doctors and that the eighth failed to pursue any of the appeal and review procedures available to her.

Accordingly, the court has considered whether the claims raised in the complaint are moot. Although the eight participants named in the complaint may no longer be pursuing coverage for the precise medication prescribed by their doctors, the exception to the mootness doctrine for cases "capable of repetition yet evading review" applies here. See, e.g., *Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)* (case may not be moot if the underlying dispute between is "capable of repetition, yet evading review"); *Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 628 (2d Cir. 1989)* (case is "capable of repetition, yet evading review" where "the issues properly presented, and their effects, . . . will persist in [the] future . . . and within a time frame too short to allow resolution through litigation.") (citations omitted). Moreover, there is a line of Supreme Court decisions standing for the proposition that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *DeFunis v. Odegaard, 416 U.S. 312, 318, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1975)* (citing cases). These decisions and the doctrine they reflect would be quite relevant here if the issue of mootness arises by reason of unilateral action by the defendant to grant individual relief. Otherwise, "the defendant is free to return to [its] old ways, and this fact would be enough to prevent mootness because of the public interest in having the legality of the practices settled." Id. Still, if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 709, 145 L. Ed. 2d 610 (2000).*

[**10]

All eight individuals have executed an "Assignment of Cause of Action Under ERISA," copies of which are attached to the complaint. In those assignments, each individual states:

I hereby assign to the State of Connecticut any cause of action I may have arising from my status as a participant in or beneficiary of an employee welfare benefit plan established pursuant to the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), upon the following conditions:

1. I believe my managed care organization has improperly and illegally obstructed my access to safe and effective prescription medications. I believe many other Connecticut residents have been injured in a similar [*500] way. I cannot afford to hire private attorneys to protect my rights under ERISA.

2. By this assignment I intend to empower the State of Connecticut, by and through the Attorney General, to take action to protect me, and people like me, pursuant to *29 U.S.C. 1132*(a)(3), which provides that I, or my assignee, may bring an action to enjoin any act or practice which violates the terms of my health care plan, or to obtain other appropriate equitable relief to redress such [**11] violations or to enforce provisions of ERISA or the plan. I agree to cooperate with the Attorney General's Office in any such action, and I agree that the facts of my case should be made public. I am willing, if necessary, to testify under oath.

3. Any positive result the Attorney General is able to obtain will help me, and other people in my position, to receive the medically necessary prescription medications to which we are entitled and which are essential to our health and well-being.

Assignments of Cause of Action Under ERISA, attached to Complaint as Plaintiff's Exhibits 1-8.

Thus, in its complaint the State of Connecticut asserts claims for equitable and injunctive relief pursuant to Section 502(a)(3) of ERISA, *29 U.S.C. § 1132*(a)(3), in its capacity as the assignee of the named individual enrollees, and also in its capacity as parens patriae. The State specifically requests that this court enter an order:

(a) requiring the defendant to provide its enrollees with the prescription medications ordered by the attending physician unless the defendant submits to the Court, and the Court approves, a plan for substituting the defendant's [**12] preferred medications for those originally prescribed while insuring [sic] that (i) the substitution is approved by the attending physician and (ii) the enrollee experiences no unreasonable delay before receiving an appropriate medication;

(b) requiring the defendant to comply with the dictates of ERISA and disclose to enrollees information sufficient to inform them fully and accurately, prior to their enrollment or re-enrollment in the plan, concerning the nature of the prescription drug benefit to which they are entitled; and

(c) requiring that whenever an enrollee requests coverage of a prescription drug by presenting a completed prescription form to a participating pharmacy and coverage is denied, the defendant shall give the enrollee a written denial notice setting forth the specific reason for the denial, and the steps necessary to file an appeal.

Compl. at 4-5, P 5 and at 30, P 91.

II. Standard of Review

When deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well pleaded factual allegations in the plaintiff's favor. See *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974);* [**13] *LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991).* In addition, the court must draw inferences in the light most favorable to the plaintiff. See *Scheuer, 416 U.S. at 236.* Dismissal is not warranted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims which would entitle [it] to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957);* see also *Hishon v. Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)* (motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"); *Still v. DeBuono, 101 F.3d 888, 891 [*501] (2d Cir. 1996).* The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether [it] is entitled to offer evidence to support [its] claims." *United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990)* [**14] (citing *Scheuer, 416 U.S. at 236).*

The function of a motion to dismiss is "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984),* quoting *Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).* The motion must therefore be decided solely on the facts alleged. See *Goldman v. Belden, 754 F.2d 1059, 1065 (2d Cir. 1985).* In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents

attached thereto as exhibits or incorporated therein by reference. See *Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991).*

III. Discussion

There is no authority in the Second Circuit, and very little elsewhere, regarding a state's standing to bring an ERISA civil enforcement action either under the doctrine of parens patriae or as the assignee of participants in a group health insurance plan. Nor is there legislative history that sheds much light on these issues. [**15] n2 As a result, this decision depends largely upon a plain reading of section 502(a)(3), principles of statutory construction, and federal preemption of the field to the exclusion of the states.

n2 See e.g., S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621; H.R. Rep. No. 93-533 at 17, 2 Leg. Hist. 2364; H.R. Rep. No. 103-601(II), 103rd *Cong., 2nd Sess. 1994, 1994 WL 388009* at * 1995-2000.

A. Standing Under Section 502(a)(3) of ERISA.

The State is not included among those identified in section 502(a)(3) of ERISA, *29 U.S.C. § 1132*(a)(3), as authorized to bring an enforcement action. Subsection (a) of that section, n3 entitled "Persons empowered to bring a civil action," provides that: "A [*502] civil action may be brought -- . . . (3) by a participant, beneficiary, or fiduciary . . . ." The State does not argue that it qualifies as a participant, beneficiary, or fiduciary with respect to the PHS plans at issue in this case.

n3 *29 U.S.C. § 1132*(a) provides:
(a) Persons Empowered to Bring a Civil Action
A civil action may be brought--

(1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (l) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or (9) in the event that the purchase of an insurance contract or insurance annuity

> in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

[**16]

Apparently recognizing that section 502(a)(3) does not empower the State to bring this action in its own right, Connecticut argues that it derives standing to sue both from the doctrine of parens patriae and from the State's status as the assignee of plan participants and/or beneficiaries. The State's arguments are inconsistent with the statutory scheme of section 502(a), a provision that "itself demonstrates Congress' care in delineating the universe of plaintiffs who may bring certain civil actions." *Harris Trust and Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 147 L. Ed. 2d 187, 120 S. Ct. 2180, 2187 (2000)* (citations omitted). Congress carefully limited the persons empowered to bring a civil enforcement action under section 502(a)(3) to "a participant, beneficiary, or fiduciary." *29 U.S.C. § 1132*(a)(3). The State cannot easily overcome its omission from section 502(a)(3).

> When construing a statutory provision, the proper analysis "begins with the language of the statute . . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S.*

Ct. 755 (1999). [**17] Section 502(a) provides a clear answer to the question whether the State can bring an action under section 502(a)(3). The inference that Congress intentionally omitted states from section 502(a)(3) finds strong support in the fact that states are expressly empowered by section 502(a)(7) to bring only a very limited class of cases. *29 U.S.C. § 1132*(a)(7) (action may be brought "by a State to enforce compliance with a qualified medical child support order . . . ."). Having empowered states to bring one type of ERISA enforcement action, Congress would surely have included states in section 502(a)(3) had it intended to empower them to bring actions such as the present one. Cf. *Commonwealth of Pennsylvania, Department of Public Welfare v. Lubrizol Corp. Employee Benefit Plan, 737 A.2d 862, 867 n.6 (Pa. Commw. Ct. 1999)* ("It is clear, however, that when Congress intended to provide a civil action for a State with respect to pension plans it clearly did so."; citing section 502(a)(7)). n4 Similarly, the statutory provisions relating to state acquisition of the rights of third parties through assignment, which are limited to reimbursing the states [**18] for payments made under state plans for medical assistance, see *29 U.S.C. § 1169*(b), would have included a broader empowerment of the states to use assignments from third parties had Congress intended to grant broader rights.

n4 The Commonwealth Court of Pennsylvania is an intermediate level appellate court created by an amendment to the Pennsylvania Constitution in 1968. The court operates in conjunction with the Pennsylvania Superior Court -- also an intermediate level appellate court -- and, among other things, hears appeals regarding public sector issues that are considered by multi-judge panels. See, e.g., "The Court for Appeals -- and Trials -- of Public Issues: The First 25 Years of

Pennsylvania's Commonwealth Court," *4 Widener J. Pub. L. 321 (1995).*

A similar, strong inference of Congressional intent arises from the fact that Congress empowered the Secretary of Labor to bring certain actions in section 502(a)(5). *29 U.S.C. § 1132*(a)(5). Congress' [**19] care in delineating which parties can bring which actions is evident in the slight differences between subsections (a)(3) and (a)(5). In subsection (a)(5), Congress empowered the Secretary, a governmental representative, [*503] to bring precisely the types of actions authorized by subsection (a)(3) -- except for actions to enjoin acts or practices that violate terms of an ERISA plan and actions to enforce the terms of the plan. Compare *29 U.S.C. § 1132*(a)(3) (authorizing actions "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or other terms of the plan.") (emphasis supplied) with *29 U.S.C. § 1132*(a)(5) (same, but for italicized language). In light of this careful parsing of claims that can be brought by particular parties, the court cannot conclude that a governmental entity not even mentioned in section 502(a)(3) can have broader indirect rights to sue than the rights expressly reserved to another governmental actor, the Secretary of Labor, [**20] in section 502(a)(5).

Although Congress did not specifically prohibit suits by states under the theories of standing raised in the present case, Congress spoke loudly with its silence. Under established principles of statutory construction, the specific inclusion of subsection (7) in section 502(a) amply demonstrates Congress' intent to limit suits by states to the claims identified in subsection (7). The general language of subsection (3) of the statute "will not be held to apply to a matter specifically dealt with in

another part of the same enactment," *Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228, 1 L. Ed. 2d 786, 77 S. Ct. 787 (1957)* (citations and internal quotations omitted), "particularly when the two [provisions] are interrelated and closely positioned, both in fact being parts of" the same statutory scheme. *HCSC-Laundry v. United States, 450 U.S. 1, 6, 67 L. Ed. 2d 1, 101 S. Ct. 836 (1981)* (per curiam).

In short, the "carefully integrated civil enforcement provisions found in § 502(a) of the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate [**21] expressly." *Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985)* (emphasis in original). Although Russell dealt with the issue of remedies rather than standing, the reasoning of that decision applies with equal force here. Not surprisingly, therefore, "federal courts have predominantly treated the terms of the Act as exclusive and have denied standing to plaintiffs not specifically enumerated therein." *St. Francis Hospital and Medical Center v. Blue Cross & Blue Shield of Connecticut, Inc., 776 F. Supp. 659, 661 (D. Conn. 1991)* (citation omitted); see also *Lifetime Medical Nursing Services, Inc. v. New England Health Care Employees Welfare Fund, 730 F. Supp. 1192, 1195 (D.R.I. 1990)* (majority of federal courts have treated section 1132 as exclusive) (collecting cases). Although there is nothing in the legislative history expressly indicating that the list of parties empowered to sue under section 502 is exclusive, n5 the Second Circuit has expressly stated that

we focus not on whether the legislative history reveals that Congress intended to prevent actions by employers [**22] or other parties, but instead on whether there is any indication that the legislature intended to grant subject matter jurisdiction over suits by employers, funds or other parties not listed in § [502] . . . . we therefore conclude that

absent such expression, § [502] should be viewed as an exclusive jurisdictional grant.
[*504]

Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889, 892 (2d Cir. 1983).

n5 There is also nothing in the legislative history that conflicts with this interpretation. See S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533 at 17, 2 Leg. Hist. 2364 (describing House version in identical terms); H.R. Rep. No. 103-601(II), 103rd *Cong., 2nd Sess. 1994, 1994 WL 388009* at *1995-2000. See also *Varity Corp. v. Howe, 516 U.S. 489, 512, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996).*

[**23]

Neither of the parties nor the court has found any decision on the precise question whether states have standing under section 502(a)(3) to bring suit as parens patriae or as the assignee of plan participants. n6 The statutory scheme suggests that such standing is unavailable to the states.

n6 In an action by the California Chamber of Commerce and others for declaratory and injunctive relief, the Central District of California, in ruling on whether enforcement of state law and procedures with respect to severance benefit plans had been preempted by ERISA, stated, in dicta, that California Labor Code § 98(a) and 96(h)

intrude[] on Congress' delegation of the "parens patriae" function under ERISA to the Secretary of Labor. Under the act, the Secretary has plenary authority to bring civil actions including equitable relief to redress any individual violation. *29 U.S.C. § 1132*(a)(5). Again, the Congressional scheme does not contemplate that state labor commissioners should exercise a similar parens patriae function to redress asserted individual violations of ERISA's benefit provisions by taking assignments of such claims and prosecuting them on behalf of employees.

California Chamber of Commerce v. Simpson, 601 F. Supp. 104, 109 (C.D. Cal. 1985).

[**24]

B. Parens Patriae Standing

1. Parens Patriae Factors

To prevent "injury to those who cannot protect themselves," the common law has always recognized the prerogative of the sovereign to bring suit on behalf of its citizens as parens patriae, the "parent of the country." See *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982)* ("Snapp"); see also *People of the State of New York v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143, 146 (S.D.N.Y. 1995);* Black's Law Dictionary 1114 (6th ed. 1990). The requirements of parens patriae standing have been clearly defined by the Supreme Court and the Second Circuit Court of Appeals. In Snapp, the Supreme Court held that, in order to establish parens patriae standing: (1) the State must have "alleged injury to a sufficiently substantial segment of its population;" (2)

the state "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party;" and (3) the state "must express a quasi-sovereign interest." *458 U.S. at 607.* n7 Additionally, the United [**25] States Court of Appeals for the Second Circuit has interpreted Snapp to require a finding that the State act on behalf of individuals who could not obtain complete relief through a private suit. People of the State of New York v. 11 Cornwell Co., 695 F.2d 34, 40 (2d Cir. 1982), vacated in part on other grounds, *718 F.2d 22 (2d Cir. 1983)* (en banc); see also *People v. Peter & John's Pump House, Inc, 914 F. Supp. 809 at 811-12; Mid Hudson Medical Group, 877 F. Supp. at 148-49.* n8

n7 "Courts in this circuit have enumerated the requirements differently or focused on different aspects of the test, but they agree on the relevant considerations. Compare, e.g., *People of the State of New York v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143, 146 (S.D.N.Y. 1995)* with *People of the State of New York v. Holiday Inns, Inc., 656 F. Supp. 675, 677 (W.D.N.Y. 1984)." People of the State of New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 811 n.2 (N.D.N.Y. 1996).*

n8 "This 'additional' requirement is consistent with the Supreme Court's statement that a state acting merely as a nominal party has no parens patriae standing. *Snapp, 458 U.S. at 600, 102 S. Ct. at 3265.* In other words, if the state has no quasi-sovereign interest apart from the interests of private individuals, who can obtain complete relief through their own litigation, then no parens patriae standing exists." *Peter & John's Pump House, Inc., 914 F. Supp. at 811 n.3.*

[**26]

a. "Substantial Segment" of the State Population

PHS argues that the State has not alleged an injury to a sufficiently substantial segment of its population because the claims asserted are for injuries to only eight of its citizens. The State responds that the individuals referenced in its complaint [*505] are representative of others and their experiences are illustrative examples of the alleged problems with the PHS drug formulary.

> The raw number of individuals directly involved does not determine whether the State has alleged injury to a sufficiently substantial segment of its population. See *Snapp, 458 U.S. at 607; Mid Hudson Medical Group, 877 F. Supp. at 148.* Moreover, there is no magic number of affected citizens necessary to establish parens patriae standing:

The [Supreme] Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged [**27] injury to a sufficiently substantial segment of its population.

Snapp, 458 U.S. at 607; see also *Peter & John's Pump House, Inc., 914 F. Supp. at 812.*

Indeed, "the majority of courts in this circuit broadly construe the 'substantial segment' requirement of parens patriae standing." *Peter & John's Pump House, Inc., 914 F. Supp. at 812.* For example, in 11 Cornwell Co., the Second Circuit rejected a challenge to parens patriae standing where the state alleged discrimination against eight to ten

proposed group home residents who were mentally retarded. The court reasoned that future group home residents, people living in mental health institutions, and the community at large also would be affected "were this kind of incident to be tolerated without redress." 11 Cornwell Co., 695 F.2d at 39-40. Parens patriae standing was also sustained where the state alleged discrimination against fifteen proposed group home residents who had AIDS, on the theory that the discrimination affected future group home residents, the community at large, and the entire population of people with AIDS. Support Ministries for Persons [**28] with *Aids, Inc. v. Village of Waterford, 799 F. Supp. 272, 277 (N.D.N.Y. 1992).* Similarly, in Mid Hudson Medical Group, the district court permitted parens patriae standing where the state alleged that a hospital discriminated against its seven to ten hearing-impaired patients. Again, the court decided that the effect of the defendant's alleged conduct "threatened all hearing impaired citizens and perhaps disabled citizens throughout New York," *Mid Hudson Medical Group, 877 F. Supp. at 148.*

> Accepting the truth of plaintiff's allegations for purposes of the present motion, the State has alleged injury to more than the eight specifically identified residents. See *Snapp, 458 U.S. at 607.* The individual enrollees' experiences represent examples of the alleged obstructions by PHS to prescription medications that enrollees' physicians believe are most safe and effective. See, e.g., Assignments of Cause of Action Under ERISA, attached to Complaint as Exhibits 1-8 ("I believe my managed care organization has improperly and illegally obstructed my access to safe and effective prescription medications. I believe many other Connecticut [**29] residents have been injured in a similar way."). As noted by at least two other courts in this circuit, the "Attorney General's use of a small group

of 'aggrieved persons' as exemplars for a larger class is neither new nor objectionable. . . ." *Peter & John's Pump House, Inc., 914 F. Supp. at 813; Mid Hudson Medical Group, 877 F. Supp. at 147.* The State's allegations and requests for injunctive relief clearly implicate more than just the eight named individuals -- indeed, they could affect all Connecticut residents who are enrollees in PHS health plans, and could indirectly affect Connecticut residents who are enrollees in other plans as well. The State therefore meets the first test of parens patriae standing, alleged injury to a sufficiently [*506] substantial segment of its population.

b. Connecticut as More Than a Nominal Party

For the same reason, the State of Connecticut is more than a nominal party. To meet this test, Connecticut must show an interest apart from the interests of particular private parties. *Snapp, 458 U.S. at 607.* The relief sought by the complaint, if granted, would likely enure to the benefit of all Connecticut [**30] residents who are enrollees in PHS health plans. The State has alleged injury to a substantial segment of Connecticut's population because the eight individuals identified in the complaint "are not the only persons who will be or have been affected by defendant['s] actions. Rather, also affected are similar [individuals] in months and years to come." *Mid Hudson Medical Group, 877 F. Supp. at 148,* citing *Support Ministries, 799 F. Supp. at 277.* Accordingly, the state has articulated an interest apart from the interests of the particular private parties referenced in the complaint. See *Peter & John's Pump House, Inc., 914 F. Supp. at 813; Mid Hudson Medical Group, 877 F. Supp. at 147* ("The Attorney General's use of a small group of 'aggrieved persons' as exemplars for a larger class . . . does not render him a nominal party.").

c. Quasi-Sovereign Interest

A more difficult question is whether Connecticut has a viable quasi-sovereign interest in the subject matter of this ERISA enforcement action. As an initial matter, it is unclear that a state can have a quasi-sovereign interest under ERISA -- a field that [**31] has been broadly preempted by Congress.

> The State argues that it has a quasi-sovereign interest in protecting the physical health of its citizens. The court agrees. The Supreme Court has observed that "a State has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general." *Snapp, 458 U.S. at 607* (emphasis added); see also *Mid Hudson Medical Group, Inc., 877 F. Supp. 143.* The Second Circuit has also stated that the state's interest in the "health and well-being . . . of its residents in general" is the "primary category of quasi-sovereign interest." 11 Cornwell Co., 695 F.2d at 39 (emphasis added); see also *Support Ministries, 799 F. Supp. at 277.* Although the state has alleged an injury to its quasi-sovereign interest in the health and well being of its citizens, the question remains whether Connecticut's general interest in the health and welfare of its citizens, on balance, can overcome the broad preemptive scope of ERISA.

The State argues that the ERISA preemption clause does not apply to the present litigation because the State "relies solely on ERISA [**32] itself. The relief requested is appropriate only because ERISA requires it." See Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 17. The State argues that it has not used any state law or taken any other state action having the effect of law with respect to this lawsuit. Id. Given the far reaching preemptive scope of ERISA, the court disagrees.

ERISA was designed to protect the interests of employees and their beneficiaries in employee benefit plans. *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983).* ERISA's comprehensive regulatory scheme, however, was intended to establish the regulation of benefit plans as "exclusively a federal concern." *Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 46, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987).* In order to maintain federal control over benefit plan regulation, ERISA contains a "very broad preemption clause." *Hydrostorage, Inc. v. Northern California Boilermakers, 891 F.2d 719, 726 (9th Cir. 1989),* cert. denied, *498 U.S. 822, 112 L. Ed. 2d 46, 111 S. Ct. 72 (1990).* This preemption clause, contained in section 514(a) of [*507] ERISA, *29 U.S.C. § 1144* [**33] (a), provides, in pertinent part, that

the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

> The term "State law" is defined expansively to include "all laws, decisions, rules, regulations, or other State action having the effect of law . . . ." *29 U.S.C. § 1144*(c) (emphasis added). Thus, subject to certain exceptions not applicable here, Congress intended ERISA to have a broad preemptive scope, occupying the entire field of regulation of employee benefit plans. *Shaw, 463 U.S. at 98-99, 103 S. Ct. at 2900-01.* As set forth above, the State seeks comprehensive injunctive and equitable relief and, specifically, an order

(a) requiring the defendant to provide its enrollees with the prescription medications ordered by the attending physician unless the defendant submits to the Court, and the Court approves, a plan for substituting the defendant's preferred medications for those originally prescribed while insuring [sic] that (i) the substitution is approved by the attending

physician and (ii) the enrollee experiences no unreasonable [**34] delay before receiving an appropriate medication;

(b) requiring the defendant to comply with the dictates of ERISA and disclose to enrollees information sufficient to inform them fully and accurately, prior to their enrollment or re-enrollment in the plan, concerning the nature of the prescription drug benefit to which they are entitled; and

(c) requiring that whenever an enrollee requests coverage of a prescription drug by presenting a completed prescription form to a participating pharmacy and coverage is denied, the defendant shall give the enrollee a written denial notice setting forth the specific reason for the denial, and the steps necessary to file an appeal.

Compl. at 4-5, P 5 and at 30, P 91. Notwithstanding the State's argument that it is merely seeking to have PHS comply with existing ERISA requirements, the far reaching relief requested by the State would affect the regulation of benefit plans, an exclusively federal concern. If granted standing to sue under section 502(a)(3), the State could, through litigation, obtain relief relating to ERISA benefit plans that it could not otherwise mandate through "laws, decisions, rules, or regulations." Because [**35] virtually every ERISA enforcement action could be grounded on a general interest in the health and well being of its citizens, the State's argument would establish a quasi-sovereign interest in every ERISA enforcement action raising issues common to multiple plan participants. Where, as here, the State has sought comprehensive relief under ERISA, permitting parens patriae standing would permit an end run around the ERISA preemption clause.

The court agrees that the State has a general interest health and well being of its residents. Congress, however, has precluded the State from having a quasi-

sovereign interest in the specific relief sought by this lawsuit. In short, the State's general interest cannot overcome the specific and focused preemptive scope of ERISA, "the most sweeping preemption statute ever enacted by Congress." *California Chamber of Commerce v. Simpson, 601 F. Supp. 104, 109 (C.D. Cal. 1985).* d. Complete Private Relief

Although it is a very close call, the court also concludes that the State lacks parens patriae standing because the alleged victims of PHS' drug formulary may obtain complete relief through private or other litigation [**36] brought on their behalf. Specifically, this factor weighs against the State because of the designation in ERISA of the United States Secretary of Labor as the government representative to act on behalf of plan participants and because ERISA contains provisions providing for [*508] an award of reasonable attorneys' fees and costs.

The State argues that "this case is not just about the individual assignees whose problems with PHS form part of the basis for bringing this claim. The relief that is sought is class-wide injunctive relief rather than damages or individualized relief for any specific plan beneficiary." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 26. The State argues that the mere possibility that an individual could obtain relief for himself or herself does not preclude the State from seeking complete relief for all current and future enrollees, and that this case has a much broader scope than the considerable problems the named individuals faced in their dealings with PHS. See id., citing *Mid Hudson Medical Group, 877 F. Supp. at 149; Peter & John's Pump House, Inc., 914 F. Supp. at 809; Support Ministries, 799 F. Supp. at 278-79;* [**37] *Commonwealth of Massachusetts v. Bull HN Information Systems, Inc., 16 F. Supp. 2d 90, 102 (D. Mass. 1998)* ("The Attorney General is seeking broad injunctive

relief of a kind that individual litigants likely would not attempt to seek."). The State further argues that each individual PHS plan participant's injury is relatively small, making it virtually impossible for individual claims to be pursued against PHS. Finally, the State argues that most private individuals do not have the resources or stamina for prolonged litigation of the sort contemplated by the complaint in this case. See Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 26, citing *Mid Hudson Medical Group, 877 F. Supp. at 149.*

> Although the court is mindful of, and empathizes with, the State's concerns, those concerns are undercut by the grant of standing to the Secretary of Labor, which one court has described as "Congress' delegation of the 'parens patriae' function under ERISA to the Secretary of Labor." *California Chamber of Commerce, 601 F. Supp. at 109.* Under section 1132(a)(5), the Secretary of Labor has plenary authority to bring [**38] civil actions, including those for equitable relief, to redress any individual violation of ERISA. See *29 U.S.C. § 1132*(a)(5) ("A civil action may be brought . . . by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter."). As discussed more fully below, ERISA's unique statutory scheme does not contemplate that a State may exercise a similar parens patriae function to redress asserted individual violations of ERISA's benefits provisions. See *California Chamber of Commerce, 601 F. Supp. at 109.*

The State's concerns are further ameliorated because ERISA specifically provides that reasonable attorneys' fees and costs may be awarded by a federal court to either party to a suit brought pursuant to section 502. See *29 U.S.C. §*

1132(g)(1) ("In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."); see also [**39] H.R. Rep. No. 103-601(II), 103rd *Cong., 2nd Sess. 1994, 1994 WL 388009* at *1998-99 ("This section also amends section 502(g) of ERISA, to provide that in any action or settlement proceeding under this title with respect to a health plan by a participant or beneficiary under such plan in which the participant or beneficiary prevails or substantially prevails, the participant or beneficiary shall be entitled to reasonable attorney's fees, reasonable expert witness fees, and other reasonable costs relating to the action. Fees to which the participant or beneficiary is entitled under this paragraph shall be at generally prevailing hourly rates."). Thus, there is an economic incentive for private attorneys who have the resources and stamina for the type of prolonged litigation contemplated by the State, to bring private civil actions pursuant to section 502 -- particularly where, as [*509] here, the complaint seeks relief on behalf of several individuals or on a class-wide basis. The effectiveness of the attorneys' fee provisions is amply demonstrated by the numerous ERISA class action cases brought since the enactment of the attorneys' fees provision.

Although the court recognizes [**40] that the interests of the State may not necessarily be coextensive with those of individual victims, and that private litigants might not achieve the State's idea of complete relief because they might have a greater incentive to compromise broad requests for injunctive relief in exchange for more individualized relief, the unique provisions of ERISA provide adequate alternative means of civil enforcement by which individual plaintiffs may obtain complete relief. Specifically, Congress' delegation of enforcement authority to the

Secretary of Labor and ERISA's attorneys' fees provision diminish traditional concerns that private litigants will be unable to obtain complete relief without State parens patriae standing.

2. ERISA's Statutory Scheme

The State argues that parens patriae standing has been found to exist under many federal statues and accordingly, its omission from ERISA is of no consequence. It is true that federal courts have frequently granted states parens patriae standing to enforce a variety of federal statutes that do not specifically provide standing for suits by states, including *42 U.S.C. § 1983, 42 U.S.C. § 1985,* [**41] the Americans with Disabilities Act ("the ADA") and the Fair Housing Act. See *Mid Hudson Medical Group, 877 F. Supp. at 146* (collecting cases). Each of these statutes, however, differs from ERISA in one significant respect: unlike ERISA, which expressly limits the class of persons entitled to bring suit, the federal statutes under which states have been granted parens patriae standing all contain broad civil enforcement provisions. Indeed, they all permit suit by any "person" that is "injured" or "aggrieved." See, e.g., *42 U.S.C. § 1983* ("Every person who, under color of any statute, regulation, custom, or usage, of any State or Territory or the District of Colombia subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .") (emphasis added); *42 U.S.C. § 1985* ("If two or more persons in any State or Territory conspire . . [**42] . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of

equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."); *42 U.S.C. § 12117*(a) ("The powers, remedies and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . ."); *42 U.S.C. § 12133* ("The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."); n9 *42 U.S.C. § 42188* ("The remedies and procedures [*510] set forth in section 2000a-3(a) of this [**43] title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title."); *42 U.S.C. § 3613*(a)(1)(A)("An aggrieved person may commence a civil action in an appropriate United States district court or State court . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.").

n9 With respect to redress for discrimination in violation of *42 U.S.C. § 12132,* Congress referred to remedies available under Section 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, *29 U.S.C. § 794a.* The ADA's Title II enforcement provision extends relief to "any person alleging discrimination on the basis

of disability." *42 U.S.C. § 12133.* Similarly, the Rehabilitation Act extends its remedies to "any person aggrieved" by the discrimination of a person on the basis of his or her disability. *29 U.S.C. § 794a*(a)(2).

[**44]

ERISA, on the other hand, as noted above, specifically enumerates those parties that are permitted to bring suit, a list that does not include states. Unlike the statutes under which federal courts have recognized states' parens patriae standing, "federal courts have predominantly treated the terms of [ERISA] as exclusive and have denied standing to plaintiffs not specifically enumerated therein." *St. Francis Hospital and Medical Center, 776 F. Supp. at 661.* Among these courts is the Second Circuit. See *Pressroom Unions-Printers Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir. 1983).* Thus, ERISA's civil enforcement provisions are different than the federal statutes under which states have been granted parens patriae standing in that ERISA expressly limits the class of persons entitled to bring suit.

In short, although the court is mindful of the Second Circuit's broad view of parens patriae standing, see *Peter & John's Pump House, Inc., 914 F. Supp. at 814,* the typical concerns do not apply in the unique context of ERISA. Because the State's general interest in the health and well being of [**45] its citizens cannot overcome the broad preemptive scope of ERISA; because ERISA provides adequate alternative means of civil enforcement by which individual plaintiffs may obtain complete relief, and because the civil enforcement provisions of ERISA are exclusive and limit potential plaintiffs to those specifically enumerated therein, parens patriae standing is not appropriate under ERISA section 502(a)(3).

C. Standing As Assignee of Participants

For virtually the same reasons, the State does not have standing through the assignment of rights from the individual plan participants named in the complaint. As discussed above, the civil enforcement provisions of ERISA are exclusive and provide standing only to plaintiffs who are specifically enumerated therein. See *Pressroom Unions-Printers Income Security Fund, 700 F.2d at 892; St. Francis Hospital and Medical Center, 776 F. Supp. at 661.* Assignees, however, are not granted standing by the civil enforcement provisions of ERISA; nor are legal representatives, as they are in some other statutes. n10 See *29 U.S.C. § 1132*(a); see also *Chamber of Commerce, 601 F. Supp. at 109* [**46] ("the Congressional scheme does not contemplate . . . taking assignments of such claims and prosecuting them on behalf of employees."). n11

n10 Executors are not listed as parties empowered to bring suit under section 502. Accordingly, this decision raises a potential conflict with the many cases that have permitted executors to bring actions for payment of ERISA benefits, at least in the context of pension plans. These cases may be explained by the fact that, by operation of law, the executor is the only person through whom the beneficiary, i.e., the estate of a plan participant, can act.

n11 PHS argues that the individuals assignments are invalid because each of the plans at issue contain a valid anti-assignment clause. Among other things, the State responds that, the assignments in this case are valid; that the anti-assignment clause on which PHS relies is unclear, and in any event, the purported anti-assignment clause should be excluded from consideration on a motion to dismiss. The court has not relied on the anti-assignment clause in ruling on this motion to dismiss.

[**47] [*511]

The State's attempt to bring suit in its capacity as the assignee of plan participants and/or beneficiaries is inconsistent with the statutory scheme of section 502(a), a provision that "demonstrates Congress' care in delineating the universe of plaintiffs who may bring certain civil actions." Harris Trust and Savings Bank, U.S. , 120 S. Ct. at 2187.

> As noted above, states are expressly empowered by section 502(a)(7) to bring only a very limited class of cases. *29 U.S.C. § 1132*(a)(7). Having empowered states to bring one type of ERISA enforcement action, Congress would surely have included states in section 502(a)(3) had it intended to empower them to bring actions such as the present one as the assignee of plan participants and/or beneficiaries. See *Lubrizol Corp., 737 A.2d at 867 n.6.* The statutory provisions relating to state acquisition of the rights of third parties through assignment, which are limited to reimbursing the states for payments made under state plans for medical assistance, see *29 U.S.C. § 1169*(b), would have included a broader empowerment of the states to use assignments [**48] from third parties had Congress intended to grant broader rights.

Although Congress did not specifically prohibit suits by states as the assignee of plan participants and/or beneficiaries in section 502, "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mutual Life Insurance Co., 473 U.S. at 146* (emphasis in original); see also *Pressroom Unions-Printers League Income Security Fund, 700 F.2d at 892* ("absent such expression, § 1132[] should be viewed as an exclusive jurisdictional grant."). Because "federal courts

have predominantly treated the terms of the Act as exclusive and have denied standing to plaintiffs not specifically enumerated therein," *St. Francis Hospital and Medical Center, 776 F. Supp. at 661;* see also *Lifetime Medical Nursing Services, Inc., 730 F. Supp. at 1195,* standing as the assignee of plan participants and/or beneficiaries is unavailable to the State.

IV. Conclusion

Although the ERISA statute could conceivably be better enforced if states could sue under section 502(a)(3), Congress did not see fit to grant such [**49] standing. Unlike other statutes, where Congress did not implicitly deny state standing by limiting the class of potential plaintiffs, that is precisely what Congress did in ERISA. Accordingly, under this unique statutory scheme, even indirect state standing under parens patriae or by way of assignment is unavailable to the State. This court cannot expand the scope of potential plaintiffs by a judicial order that conflicts with Congress' intent to limit standing.

This is not to say, however, that individual enrollees are necessarily without a cause of action in federal court or that grounds for a class action do not exist. Indeed, without expressly deciding whether the complaint states a cause of action, taking the allegations therein as true, it would appear that the representative enrollees have very legitimate and serious concerns that could form the basis of a valid lawsuit. The problem, however, is with the identity of the party who has attempted to bring those claims on their behalf in this case.

For all of the foregoing reasons, PHS' Motion to Dismiss (doc. # 10) is GRANTED. The clerk is instructed to close the file.

It is so ordered.

Dated at Bridgeport this 12th [**50] day of July 2000.

Stefan R. Underhill , United States District Judge

29 U.S.C. § 1132(a)(3) Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought . . . (3)by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violated any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . .

Supreme Court, U.S.
FILED
AUG 27 2002
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No. 02-02

IN THE

Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Subsequent to the decision by the Second Circuit Court of Appeals in this case, the Supreme Court of Connecticut issued its decision in *Blumenthal v. Barnes*, 261 Conn. 434 (2002), 2002 WL 1822920 (Conn.) (hereafter referred to as "*Blumenthal*"). The issue in that case was the Petitioner Connecticut Attorney General's authority under the common-law of the State to initiate and maintain suits on behalf of the State. *Id.* at *1. Connecticut's Supreme Court ruled that: (a) the Attorney-General's authority to maintain actions in the name of the State was defined and bounded by specific statutes; and (b) there had not been a transfer of common-law authority to his office by implication or otherwise. ("We, therefore, agree with the trial court that the office of the attorney general is 'a creature of statute' that is governed by statute and, thus, has no common-law authority.") *Id.* at *11. There is no Connecticut statute that authorizes the Attorney General to assert the State's *parens patriae* authority, if any, with respect to either federal causes of action in general, or the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (as amended) ("ERISA"), causes of action in particular. Following the *Blumenthal* decision, the question presented is whether this Court should deny the Petition as having been filed on behalf of the State of Connecticut without its consent or authority?

2. The Court of Appeals for the Second Circuit held that the Petitioner lacked the standing to maintain an action pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), as neither the states nor state officials are granted such standing by Congress. *State of Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2d Cir. 2002) (hereafter referred to as "*PHS*"). Congress narrowly

limited the category of persons to whom it provided such standing to: (i) ERISA plan participants and their beneficiaries; and (ii) ERISA plan fiduciaries. 29 U.S.C. § 1132(a)(3). In light of the consistent precedent that only those persons specified in § 502(a)(3) have such standing, the question presented is whether there is any controversy or unresolved question of law respecting the Second Circuit's decision that this Court needs to resolve?

3. The Second Circuit Court of Appeals also ruled that the *parens patriae* authority of the states does not empower them to assert claims under § 502(a)(3) of ERISA. It held that, even if such *parens patriae* authority existed as claimed by Connecticut, Congress had the authority under the Commerce Clause to deny to the states the power to maintain an action under ERISA. *PHS*, 287 F.3d at 120, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987). Where, as is the case with respect to ERISA §§ 514(a) and 502(a)(3), 29 U.S.C. §§ 1144(a) and 1132(a)(3), Congress has determined to fully preempt the regulation of employee benefit plans, including specifically the remedies available with respect to such plans, the Tenth Amendment to the United States Constitution permits Congress to restrict the states' exercise of their *parens patriae* authority. *Id.* at 122. In light of the consistent rulings by this Court and the Circuit courts that ERISA fully preempts the field of ERISA benefit plan regulation to the complete exclusion of any state authority, the question presented is whether this Court has any need to revisit this settled principle of law, a principle that no state other than Petitioner has seen fit to challenge?

4. The Court of Appeals further held that the assignments provided to the Attorney General by participants of ERISA plans whose benefits were covered by Respondent,

Physicians Health Services of Connecticut, Inc. (hereafter referred to as "PHS"), did not provide the State with the requisite standing to bring an action under ERISA § 502(a)(3). *Id.* at 115. The Second Circuit held that applicable precedent required this conclusion as: (a) the State had not asserted any injury to itself; and (b) in the context of assignments that left the entitlement to receive benefits with the assignors, none of the remedies would flow to the State itself. *Id.* at 118. There is established and non-controversial precedent respecting the required elements of assignments that can confer standing on an assignee to assert a federal cause of action. The question presented, therefore, is whether there is any sound reason for this Court to expend its valuable time on this case?

STATEMENT PURSUANT TO RULE 29.6

Physicians Health Services of Connecticut, Inc. is a wholly owned subsidiary of Physicians Health Services, Inc. ("PHS").

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COUNTER STATEMENT OF THE CASE

The Attorney General of Connecticut brought an unprecedented complaint asserting causes of action under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), and seeking injunctive relief against PHS (hereafter the "Complaint"). The Complaint alleged that PHS, a health maintenance organization licensed and regulated by Connecticut's Insurance Department,[1] utilized a drug formulary that purportedly obstructed ERISA plan participants' access to prescription drugs chosen by their physicians. Neither the Insurance Commissioner nor any other State agency with regulatory power over managed care organizations joined the Attorney General in his lawsuit, or authorized its filing on their behalf.

Like virtually every health plan in the nation that offers a prescription benefit, including Connecticut's own Medicaid program[2], PHS attempts to conserve limited health care dollars and ERISA plan assets through use of a drug formulary. This formulary lists thousands of prescription medications, all of which are approved by the Food and Drug Administration. Employers which voluntarily establish ERISA health benefit plans frequently contract with managed care entities such as PHS to administer, among other benefits, their plan's prescription drug coverage. PHS' formulary is updated regularly, and its members are allowed under

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1. Conn. Gen. Stat. §§ 38a-478n; 38a-225; 38a-478c; 38a-478g; 38a-478m; and 38a-478u.

2. Under its own Medicaid program, Connecticut limits coverage for over-the-counter drugs and products for Medicaid recipients to those specified in the "Connecticut Formulary." Conn. Agencies Regs. § 17-134d-81(b)(4).

Connecticut law to request generic drugs to lower their prescription costs.[3] As is the case with Connecticut's Medicaid program,[4] PHS has a "prior authorization" process which allows its members to obtain coverage for prescription drugs that are not included in the formulary applicable to their ERISA plan. The members' physicians simply submit a request for coverage of the off-formulary drug to PHS.

The Complaint challenges, solely on ERISA grounds, the PHS drug formulary applied to the ERISA plans that PHS serves. Broad injunctive relief is sought which seeks judicial revision of the ERISA plan prescription benefits administered by PHS.

Section 502(a)(3) permits only a "participant, beneficiary, or fiduciary" of a health care plan established pursuant to ERISA to bring an action "to enjoin any act or practice which violates any provision . . . of the plan, or . . . to obtain appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The relief requested by the Attorney General would involve the federal courts in the administration of ERISA welfare benefit plans. The Complaint demands, for example, that PHS be ordered to submit to a federal court for its review and approval, a plan "for substituting the defendant's preferred medications for those originally prescribed while insuring [sic] that (i) the substitution is approved by the attending physician and (ii) the enrollee experiences no unreasonable delay before receiving an appropriate medication. . . ." Compl. at 4, ¶ 5.

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3. Conn. Gen. Stat. § 20-619(b).

4. Federal law specifies requirements for formularies that states may establish under Medicaid, including requirements for a prior approval process for non-formulary drugs. *See* 42 U.S.C. §§ 1396r-8 *et seq.*

REASONS FOR DENYING THE WRIT

There are sound and dispositive reasons demonstrating that this case does not merit review by the Court. All of those reasons relate to the incapacity of the Attorney General to bring the ERISA claims he purports to assert on behalf of the State of Connecticut.

A. The Court Lacks Jurisdiction Over This Matter Because the Attorney General Has No Authority to File the Petition for a *Writ of Certiorari.*

The decision of the Connecticut Supreme Court in the *Blumenthal* case holds that the Attorney General lacks authority under Connecticut law to bring this action on his own initiative. *Blumenthal*, 2002 WL 1822920, at *11. This dispositive point of law could not have been raised below, as the decision in *Blumenthal* was issued long after the decision of the Second Circuit Court of Appeals in this case. Even if it were assumed that the Attorney General, prior to *Blumenthal*, had the colorable authority to file this action, and to then appeal its dismissal, his Petition now pending before this Court clearly is an *ultra vires* act that cannot be accorded any recognition by the Court.

The *Blumenthal* decision ruled that the powers of the Attorney General of the State of Connecticut are created by, and derive exclusively from, statutes enacted by the State's legislature. *Blumenthal*, 2002 WL 1822920, at *11. The Connecticut Supreme Court expressly held that no general common-law authority to act on behalf of the State in its sovereign capacity devolved to, or resides in, the Office of the Connecticut Attorney General. *Id.* Consequently, when the Attorney General desires to exercise the State's *parens patriae* authority in a given instance, his ability to do so

depends upon the existence of a Connecticut statute conferring such authority upon him. *Id.* For example, the Attorney General may exercise the State's *parens patriae* authority to enforce its antitrust statutes only because a statute enacted by the State's legislature grants him that specific authority. *See* Conn. Gen. Stat. §§ 35-32. There is no Connecticut statute, however, which grants to the Attorney General the authority to perform any of the following acts:

> 1. File a lawsuit grounded on the remedial provisions of a federal statute, ERISA, which provisions preempt any and all state interference with the design and administration of benefits provided under ERISA plans;
>
> 2. Decide unilaterally for the State what its policies respecting prescription plan formularies should be, or how those policies should be enforced; and
>
> 3. Mandate health benefits that must be covered by managed care organizations in the State of Connecticut.

All of these acts are inextricable substantive elements of the relief sought by the Complaint.

Consequently, the Connecticut Supreme Court's ruling in *Blumenthal* compels the conclusion that the Attorney General's Petition before the Court is a nullity. The Petition has no more effect or validity than would have been the case if it were filed by a private citizen residing in Connecticut purporting to assert the State's *parens patriae* authority. On this ground alone, the Petition must be dismissed as unauthorized.

Of equal consequence, the Attorney General's lack of standing to act for the State deprives the Court of the jurisdiction to act on the Petition. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing imports justiciability, and a finding of standing, or the lack thereof, determines whether the "case or controversy" jurisdictional requirement imposed upon Article III courts is satisfied. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). As the Attorney General has no power to bring this suit under the laws of his State, which laws are the sole source of his authority, he cannot have any stake in the controversy he seeks to present for adjudication. *Lujan*, 504 U.S. at 560. That lack deprives him of standing, and also deprives this Court of jurisdiction over the Petition.

B. The Ruling that the State Lacks Standing to Assert Section 502(a)(3) Claims Is Mandated by the ERISA Statute and Established Precedent.

Congress clearly specified in ERISA Section 502(a)(3) the identity of the persons to whom it wished to provide the standing to seek the relief available through that remedial provision. Those persons are ERISA plan participants, their beneficiaries, and plan fiduciaries. *Id.* No governmental official, not even the Secretary of Labor, who has the primary regulatory responsibility for ERISA health and welfare plans,[5] has the standing to assert a Section 502(a)(3) claim. Confirmation that Congress expressly did not intend the states to have standing to assert Section 502(a)(3) claims is provided

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5. *See, e.g.*, ERISA Sections 501, 504 and 506, 29 U.S.C. §§ 1131, 1134 and 1136. *Cf. Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997) ("We begin by acknowledging the deference we owe the Secretary's interpretation of the controlling Act. The Secretary of the Department of Labor is charged with enforcing ERISA . . . ."

by Section 502(a)(7), 29 U.S.C. § 1132(a)(7) of ERISA. This is the only provision of ERISA that grants standing to the states to maintain an action for relief under the Act. In Section 502(a)(7), Congress allowed the states to "enforce compliance with a qualified medical child support order" as defined in 29 U.S.C. § 1169(2)(A). That is the sole enforcement authority granted to the states by Congress in ERISA.

This Court has consistently held that "ERISA carefully enumerates the parties entitled to seek relief under Section 502." *Franchise Tax Bd. v. Constr. Laborers Vac. Trust*, 463 U.S. 1, 27 (1983); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1984). The principle that the standing to bring an ERISA cause of action is limited solely to the parties specified by Congress in Section 502(a) has been scrupulously enforced by the Circuit Courts,[6] and the

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6. *Coleman v. Champion Int'l Corp./Champion Forest Prods.*, 992 F.2d 530, 534 (5th Cir. 1993) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loath to ignore the legislature's specificity"); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 302 (5th Cir. 1992) ("employers are conspicuously absent from the list of those entitled to bring a civil action"); *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 164 (9th Cir. 1992) ("No one except plan participants, beneficiaries, fiduciaries, and the Secretary of Labor is expressly authorized by § 1132(a) to bring claims in federal court," rejecting suit of insurance company); *Chemung Canal Trust Co. v. Sovran Bank*, 939 F.2d 12, 14 (2d Cir. 1991); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 987 (4th Cir. 1990) (standing under ERISA should be limited only to those parties enumerated in Section 502(a); *Gulf Life Insurance Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) ("These standing provisions must be construed narrowly; civil actions under ERISA are limited only to those parties and actions Congress specifically enumerated in Section 1132."); *Great Lakes Steel Div. of Nat'l Steel Corp. v. Deggendorf*, 716 F.2d 1101, 1103 (6th Cir. 1983) (employer has no standing as employer but does as plan fiduciary).

ruling of the Court of Appeals to that effect is neither novel nor a deviation from controlling precedent.

A party with standing is a prerequisite to an Article III court's adjudication of a claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Warth v. Seldin*, 422 U.S. at 498 ("In its constitutional dimension, standing imports justiciability: Whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.") The Petition offers no cogent reason why the Court should contemplate reversing its own consistent precedent in order to substitute its own judgment for that of Congress with respect to the persons who should have standing to assert claims under ERISA Section 502(a)(3). If the Attorney General believes that there are valid reasons why he and the other states' Attorneys General should have standing to assert claims under Section 502(a)(3) in order to effectuate policy reforms of prescription benefits provided to ERISA plan participants by managed care organizations, his arguments are properly addressed to Congress, not to the judiciary. *Cf. Pegram v. Herdrich*, 530 U.S. 211 (2000). Notably, even if Congress were to agree to amend ERISA Section 502(a)(3) to grant standing to state Attorneys General, Connecticut's Attorney General also would have to convince his State's legislature to grant him the authority to initiate such lawsuits.

C. Congress Has Denied the States the Ability to Exercise their Sovereignty, Including *Parens Patriae* Authority, Over Either the Benefits Offered By or the Administration of ERISA Plans.

This Court has affirmed in numerous decisions that ERISA's preemption provisions, Sections 502(a) and 514(a),

29 U.S.C. §§ 1132(a) and 1144(a), reflect the intent of Congress that the regulation of ERISA plans is "exclusively a federal concern." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2154 (2002) ("*Rush*") (Holding that an Illinois independent review statute affecting insured ERISA plan benefits was saved from preemption only because of the applicability of ERISA's "insurance savings" clause, 29 U.S.C. § 1144(b)(2)(A). Unlike the facts in *Rush*, the Attorney General does not contend that his views on the operation of ERISA plan prescription benefit formularies constitute the regulation of insurance by the State of Connecticut); *California Div. of Labor Standards Enforcement Bd. v. Dillingham*, 519 U.S. 316, 324 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 127 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *FMC Corp v. Holliday*, 498 U.S. 52, 58 (1990); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988); *Metropolitan Life v. Taylor*, 481 U.S. 58, 60-61 (1987); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 99 (1983); and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

The Attorney General does not stand in any better position with respect to ERISA's preemptive scope than the State he purports to represent in this matter. Indeed, ERISA's preemption clause expressly defines the term "State" as including:

> *any political* subdivisions thereof, or any agency or *instrumentality* of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. § 1144(c)(2) (emphasis added). The Attorney General cannot evade the direct applicability of ERISA's preemptive power to him in his capacity as an instrumentality of the State. He could abandon his official capacity, of course, and seek to maintain this action as a private citizen. If he were to do so, however, he also would abandon whatever capacity, if any, he asserts he has to invoke the State's *parens patriae* authority as a basis for the achievement of standing to assert a Section 502(a)(3) claim.

The assertion that ERISA's preemption provisions do not apply to the Attorney General's effort to impose upon ERISA plans a state official's views as to what constitutes proper plan benefit design and administration is transparently meritless. In the nearly three years that have elapsed since the Attorney General filed the Complaint, no other official of any state has filed an action seeking to be a plaintiff under ERISA Section 502(a)(3). No such officials have asserted that ERISA's preemption provisions do not preclude their interference with ERISA plan design and administration in the guise of seeking relief under ERISA Section 502(a)(3). The standing issues raised by the Attorney General clearly lack any public importance warranting the Court's concern and attention.

D. The Assignments Obtained By the Attorney General Are Ineffective to Confer Standing Upon Him To Assert an ERISA Section 502(a)(3) Claim.

The Court of Appeals found that the assignments obtained by the Attorney General from ERISA plan participants did not provide the State with a sufficient stake in the controversy attempted to be raised by the Complaint to confer standing upon the State to bring this suit. *PHS*, 287 F.3d at 116,

(*citing Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). The Second Circuit could have disposed of the issues related to the assignments on the ground that the assignors were barred by their plan documents from assigning any "rights, benefits . . . to any other person or entity, or otherwise transfer[ing] any claim . . . arising under this subscriber agreement." Joint Appendix of Petitioner (Appellant below), and Respondent (Appellee below) at 76. The assignments thus were void from the outset. *Cf. City of Hope Nat'l Med. Center v. Healthplus, Inc.*, 156 F.3d 223, 229 (1st Cir. 1998); *St. Francis Regional Medical Center v. Blue Cross and Blue Shield of Kansas, Inc.*, 49 F.3d 1460, 1464 (10th Cir. 1995); *Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1478 (9th Cir. 1991); *Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1346 (8th Cir. 1991) (ERISA preempts state statutes purporting to negate an ERISA plan's non-assignment clause.)

The assignments are invalid for the further reason that they are "partial" assignments and impermissibly "split-claims." The Attorney General confirmed at oral argument before the Second Circuit that the intent and effect of the assignments was that the assignors would "retain the right to seek payment of their benefits" from PHS, while the State would have the right to seek injunctive relief against PHS. *PHS*, 287 F.3d at 116, and n.6. Such "partial assignments" are improper because they injure "the right of the obligor [PHS] to be free of successive and repeated suits growing out of the same basic facts." *In re Fine Paper Litigation State of Washington*, 632 F.2d 1081, 1090 (3d Cir. 1980). The Restatement (Second) of Judgments, § 24, at Comment F, expressly prohibits such "claim-splitting": "[I]t is fair to hold that after judgment for or against the plaintiff the claim is

ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts."

In sum, the State improperly attempted to acquire just a portion of an ERISA claim in an effort to achieve the standing it knew it lacked to assert a Section 502(a)(3) claim. The Court of Appeals ruled that the Attorney General's efforts to achieve Section 502(a)(3) standing by means of this purely formalistic device were futile. It ruled that the Attorney General had not alleged, and could not show, that the assignments made the State an "injured party." *PHS*, 287 F.3d at 115. "Injury" to a plaintiff, the Court of Appeals pointed out, is an 'irreducible minimum" requirement of Article III standing. *PHS*, 287 F.3d at 116, *citing Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The "injury" requirement, in certain circumstances, may be satisfied if a "claim" belonging to an assignor is assigned to an assignee. *PHS*, 287 F.3d at 117, *citing Vermont Agency*, 529 U.S. at 773. A "claim," however, is more than a naked right to bring suit. *Id.* at 118, n.8. It must involve an outcome that will affect the assignee in a "personal and individual way. . . ." *Id.* at 118, *quoting Lujan*, 504 U.S. at 560 & n.1; and *Vt. Agency*, 529 U.S. at 772 ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing.") The assignments obtained by the State provided it "only the right to control" the lawsuit as none of the remedies sought would flow to the State as assignee. *PHS*, 287 F.3d at 118. The State thus: (a) had not suffered an injury itself, as it did

not, and could not, allege that it had been deprived of any benefits it was entitled to receive from PHS; and (b) the State would not be the recipient of any of the benefits produced by the relief demanded in its Complaint.

The assignments, therefore, were inadequate to provide the State with standing. Their only effect was to empower the State to orchestrate a litigation. They did not transfer either an "injury" to the State, or a right to the benefits of a favorable outcome. This simply is insufficient for the achievement of Article III standing. This Court ruled in *Valley Forge Christian College* that the "sincerity of [a state's] stated objectives and the depth of [its] commitment to them," have no bearing on standing. *Valley Forge Christian Coll.*, 454 U.S. at 486, n.21. "The essence of standing," the Court held, "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured" by the conduct constituting the ground of the claim at issue. *Id.*[7]

There is no good reason why the Court should trouble itself with a case which rests upon patently defective assignments conjured by the Petitioner to make it appear as if it had the standing to assert ERISA Section 502(a)(3) claims. The District Court and the Second Circuit Court of Appeals were not misled by the Attorney General's illusory assignments, and dealt with them as required by the applicable precedent established by this Court. There are no conflicts identified in the Petition between any of the Circuit

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7. The result reached by the Second Circuit also is consistent with ERISA precedent which rejects assignment of ERISA benefit claims other than to health care providers who are seeking payment for covered medical care services to eligible ERISA plan participants. *Simon v. Behavioral Health, Inc.*, 955 F. Supp. 93, 95 (C.D. Cal. 1997).

Courts of Appeal with respect to the requirements of Article III standing generally, or ERISA Section 502(a)(3) standing in particular. The Court's investment of its limited time on this case cannot be, and has not been, justified by the Petitioner.

CONCLUSION

For these reasons, it respectfully is submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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In The
Supreme Court Of The United States

October Term, 2001

STATE OF CONNECTICUT,

Petitioner,

v.

PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE DECISION IN *BLUMENTHAL V. BARNES* IS INAPPLICABLE TO THE PRESENT CASE.

The majority of the arguments raised by PHS in its Opposition were anticipated in Connecticut's original brief, and our presentation will not be repeated here. However, PHS raises two new issues that require a brief response.

On August 20, 2002 the Connecticut Supreme Court issued a decision in *Blumenthal v. Barnes*, 2002 Conn. LEXIS 327 ("Barnes"). The issue before the court was whether the Attorney General has standing under common law to bring an action in his own name for breach of fiduciary duties by officers of a not-for-profit organization in order to remedy the misappropriation of the organization's noncharitable receipts. *Id.* at 10. The Connecticut Supreme Court held that he does not.

A. Unlike Barnes, Which Explored the Attorney General's Common Law Authority, In This Case The Attorney General Invokes Only His *Statutory* Power to Represent the State.

The decision of the Supreme Court in *Blumenthal v. Barnes* addressed the scope of the Connecticut Attorney General's authority to bring an action under his own name under the common law against a public charity for the misappropriation of the organization's non-charitable assets. This action is brought by the State of Connecticut in its own name, as *parens patriae* for the citizens of Connecticut. Thus, *Barnes* is inapposite and does not apply here. Moreover, the Connecticut Attorney General's participation in his case is specifically authorized by Conn. Gen. Stat. § 3-125.

The statutory authority for the Connecticut Attorney General is found at Connecticut General Statutes § 3-125. [1]

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[1] Connecticut General Statute § 3-125 provides in relevant part: "The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the State House of Representatives and the State Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. When any measure affecting the State Treasury is pending before any Commissioner of the General Assembly, such committee shall give him reasonable notice of the pendency of such measure, and he shall appear and take such action as he deems to be in the best interest of the state, and he shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. All legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction. All writs, summonses or other processes served upon such officers and legislators shall, forthwith, be transmitted by them to the Attorney General. All suits or other proceedings by such officers shall be brought by the Attorney General or under his direction. He shall, when required by either house of the General Assembly or when requested by the president pro tempore of the Senate, the speaker of the House of Representatives, or the majority leader or the minority leader of the Senate or House of Representatives, give his opinion upon questions of law submitted to him by either of said Houses or any of said leaders. He shall advise or give his opinion to the head of any executive department or any state board or commission upon any question of law submitted to him. He may procure such assistance as he may require. Whenever a trustee, under the provisions of any charitable trust described in Section 45a-514 is required by statute to give a bond for the performance of his duties as trustee, the Attorney General may cause a petition to be lodged with the probate court of the district in which such trust property is situated, or where any of the trustees

The statute provides that "[t]he Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state . . . in all suits and other civil proceedings . . . in which the state is a party or is interested. . . ." Thus the statute grants the Attorney General authority to appear in all cases in which the state is "interested." That is precisely the posture here.

B. Only The Attorney General Can Assert Connecticut's Interest as Assignee of Enrollees.

The assignments executed by the eight enrollee-assignors in this case specify that the powers assigned are to be exercised by the Attorney General: "By this assignment I intend to empower the State of Connecticut, by and through the Attorney General, to take action to protect me and people like me, pursuant to 29 U.S.C. 1132(a)(3). . . ." Petitioner's Appendix at A8. Thus by their own terms the assignments foreclose the exercise of the assigned powers to state's attorneys or any other state officers other than the Attorney General. Since status as assignee is not available to state's attorneys, the Attorney General may assert the assigned interest under the authority granted by Connecticut General Statute § 3-125 giving him power to represent the state in all matters in which the state is "interested."

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reside, for the fixing, accepting and approving of a bond to the state, conditioned for the proper discharge of the duties of such trust, which bond shall be filed in the office of such probate court. The Attorney General shall prepare a topical and chronological cross-index of all legal opinions issued by the Office of the Attorney General and shall, from time to time, update the same." (emphasis added).

II. THE ASSIGNMENTS IN THIS CASE ARE VALID.

In its brief, PHS argues that the assignments in this case are "invalid" because "they are 'partial assignments' and impermissibly 'split claims.'" *Opposition* at 10. PHS cites The Restatement (Second) of Judgments, § 24, Comment F for the proposition that "[I]t is fair to hold that after judgment for or against the plaintiff the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts." *Id* at 10-11.

Plaintiffs' argument fails for three reasons. First, even assuming, *arguendo*, that the claim for benefits of an enrollee-assignor would be barred if brought after the entry of judgment in the present case, that does not mean that the assignments themselves are in any way "invalid."

Second, seven of the eight enrollee-assignors have no claim for benefits they could, even theoretically, appeal or assign. These seven[2] could not afford to purchase the medicine that had been prescribed for them. JA A46-67. Because they did not pay out-of-pocket they incurred no expense for which they could seek reimbursement. Only assignor Ann Zeisler was able to purchase the prescription drug she needed; Ms. Zeisler paid $1220 of her own money to obtain medicine to treat her migraine headaches. JA A54-55.

Finally, applicable case law provides that post-judgment claims for money damages are not barred where the initial class action litigation seeks only declaratory and injunctive relief:

---

[2] Guy Simone, Myra Doughney, Antonio Aresco, Arthur Judson, Rose Shefcyk, Richard Seastrand, and Kelly Jacek.

> The general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events. In fact, "every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages." *In re Jackson Lockdown/MCO Cases*, 568 F.Supp. 869, 892 (Ed. Mich. 1983): See, e.g., *Fortner v. Thomas*, 983 F.2d 1024, 1030-32 (11th Cir. 1993)("it is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action."); *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction* § 4455 (1981 & 1995 Supp.) (collecting cases).

Timothy Hiser v. Richard Franklin, et al., 94 F.3d 1287, 1291 (9th Cir. 1996).

In the present class action case as well, the plaintiff seeks only injunctive relief; individual enrollees would therefore be permitted to bring separate suits for benefits denied, even after judgment in this case has been entered.

CONCLUSION

In its opposition PHS has sought to cloud the issues and distract this Court from the fact that the Court of Appeals, by denying Connecticut *parens patriae* standing without identifying a clear statement of congressional intent, and by refusing to acknowledge the reality of Connecticut's Article III "injury in fact," has failed to

recognize the constitutional dimensions of Connecticut's sovereign interest in the health and welfare of its citizens.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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